Supreme Court, U.S.
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No. 10- 10-18

IN THE

Supreme Court of the United States

WEBSTER M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

DANIEL S. VOLCHOK
Counsel of Record
SETH P. WAXMAN
A. STEPHEN HUT, JR.
EDWARD C. DUMONT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000
daniel.volchok@wilmerhale.com

QUESTION PRESENTED

When a trial judge's restriction on the cross-examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause, is the standard of review de novo, as five circuits have held, or abuse of discretion, as six other circuits (and the court of appeals here) have concluded?

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Childress, Steven Alan & Martha S. Davis, *Federal Standards of Review* (3d ed. 1999) 15

Hamilton, Jesse, *Coast Guard Admiral Reprimanded: Ex-Academy Superintendent To Retire After Probe Finds Inappropriate Behavior*, Hartford Courant, Feb. 27, 2007, at A1 3-4

Kime, Patricia, *Academy Takes Heat Over Sex-Assault Cases*, Navy Times, Mar. 27, 2006, at 36 3

Lightman, David, *Academy Under Scrutiny; Coast Guard Harassment Issue Gets Attention of Congressional Panels*, Hartford Courant, May 18, 2006, at B1 3

Yardley, William, *Coast Guard Addresses Sex Assaults*, N.Y. Times, Feb. 28, 2006, at B7 3

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

Webster M. Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 68 M.J. 445. The opinion of the intermediate appellate court, the Coast Guard Court of Criminal Appeals (App. 23a-58a), is reported at 66 M.J. 556. The order and opinion of the trial judge denying petitioner's request to conduct the cross-examination at issue here (App. 59a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT

This case implicates a deep circuit conflict regarding the standard of review that applies when a trial judge's restriction on the cross-examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause. The Court of Appeals for the Armed Forces (CAAF) held here that the standard of review is abuse of discretion rather than de novo. Applying the former standard, the court rejected petitioner's Confrontation Clause claim by a vote of 3-2.

1. In early 2006, officials at the United States Coast Guard Academy filed sixteen specifications (the military equivalent of criminal charges) against petitioner Webster Smith, a cadet who was then a few months from graduation. *See* CAAF J.A. 89-92. Four weeks later, Academy officials lodged an additional five specifications. *Id.* at 93-95. Most of the specifications alleged that Mr. Smith had engaged in some form of sexual misconduct with one of several female cadets.[1]

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[1] At the time these charges were brought, Academy officials, like their counterparts at the other service academies, were facing

Pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832, an investigation of the charges against Mr. Smith was conducted by an impartial officer. *See* CAAF J.A. 193-195. After completing his investigation (including hearing from all of the accusers), the investigating officer concluded that most of the charges lacked foundation. Specifically, he recommended that twelve of the twenty-one charges be dismissed outright, that two others be resolved administratively by Academy officials, and that just seven be referred for trial by general court-martial. *See* Appellate Ex. 17. As to nine of the twelve charges for which he recommended dismissal, the officer found that there were not even reasonable grounds to conclude that Mr. Smith had committed the offense. *See id.*

Disregarding several of the investigating officer's recommendations, the official overseeing the prosecution (the Academy superintendent) directed that eleven of the twenty-one charges be dismissed and that the other ten be tried by general court-martial. This was the first (and to date only) time in the Academy's 130-year history that a cadet had been court-martialed. *See, e.g.*, Jesse Hamilton, *Coast Guard Admiral Reprimanded: Ex-Academy Superintendent To Retire After Probe Finds Inappropriate Behavior*, Hartford

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intense scrutiny and pressure from the public, the media, and Congress about perceived laxity in their handling of allegations of sexual harassment and sexual assault. *See, e.g.*, David Lightman, *Academy Under Scrutiny; Coast Guard Harassment Issue Gets Attention of Congressional Panels*, Hartford Courant, May 18, 2006, at B1; Patricia Kime, *Academy Takes Heat Over Sex-Assault Cases*, Navy Times, Mar. 27, 2006, at 36; William Yardley, *Coast Guard Addresses Sex Assaults*, N.Y. Times, Feb. 28, 2006, at B7.

Courant, Feb. 27, 2007, at A1. Mr. Smith pleaded not guilty to all ten charges.[2]

2. Prior to trial, the military judge (the military term for the trial judge, *see* 10 U.S.C. § 826) imposed a restriction on the defense's cross-examination of a key prosecution witness, SR.[3] SR, a fellow cadet, accused Mr. Smith of sexually assaulting her and extorting sexual favors from her. The defense maintained that the two cadets' sexual encounter was consensual and that SR was fabricating her accusations because the encounter occurred in Chase Hall, the Academy dormitory, where sexual activity is prohibited by cadet regulations and punishable by expulsion from the Academy, *see* App. 34a, 16a n.3. To support this argument, the defense intended to elicit on cross-examination the fact that SR had previously made a false allegation of sexual assault, telling Mr. Smith (and allowing him to tell others) that a consensual sexual encounter she had had with an enlisted man was not consensual.[4] Like the Chase Hall encounter, the encounter with the enlisted man was prohibited by cadet regulations (and hence the UCMJ, *see* 10 U.S.C. § 892; *see also United States* v. *Cain*, 59 M.J. 285, 292-293 (C.A.A.F. 2004)). The defense thus planned to argue to the jury ("members" in military parlance) that SR was once again falsely accus-

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[2] The general court-martial had original jurisdiction under Article 18 of the UCMJ, 10 U.S.C. § 818. *See, e.g.*, *Weiss* v. *United States*, 510 U.S. 163, 167 (1994).

[3] In their opinions in this case, the appellate courts referred to SR only by her initials. This petition does likewise.

[4] Mr. Smith testified at a pre-trial hearing that SR initially told him the encounter with the enlisted man was not consensual and later acknowledged that it was consensual. *See* App. 4a, 60a.

ing a man of assaulting her in order to evade discipline that she could otherwise face for willingly engaging in sexual activity that was barred by military regulations. *See* App. 27a-28a, 40a, 62a-63a. Noting that the three charges involving SR rested entirely on her testimony—the government offered no other evidence as to any of them—the defense contended that Mr. Smith was constitutionally entitled to inform the jury of facts that bore so directly on her credibility. *See* CAAF J.A. 180-181.

The government sought to exclude the proposed cross-examination of SR pursuant to Military Rule of Evidence 412. *See* CAAF J.A. 183-187. That rule, the nearly identical military counterpart to Federal Rule of Evidence 412, generally bars the admission of "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior." M.R.E. 412(a)(1) (2005 ed.).[5] The rule includes an exception, however, for "evidence the exclusion of which would violate the constitutional rights of the accused." M.R.E. 412(b)(1)(C). This exception, which the defense invoked in seeking to conduct the proposed cross-examination of SR, *see* CAAF J.A. 180-181, "addresses an accused's Sixth Amendment right of confrontation," *United States* v. *Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). Hence, the issue for the military judge was whether the Confrontation Clause required that the proposed cross-examination be allowed.

The judge concluded that it did not. *See* App. 59a-64a. He agreed that the defense's theory about SR's

[5] Minor amendments were made to Military Rule of Evidence 412 in 2008. The version cited herein is the one that was in effect throughout the court-martial proceedings.

prior fabrication of assault "would be a valid reason for admitting this evidence under M.R.E. 412(b)(1)(C)," i.e., pursuant to Mr. Smith's Sixth Amendment rights. App. 63a. He nonetheless prohibited the proposed cross-examination, in part because allowing it could, he believed, "sidetrack[] the member[s'] attention to a collateral issue," App. 64a, and in part because the only evidence of SR's prior false accusation came from Mr. Smith, whose credibility the judge questioned, *see* App. 63a.[6] The judge ultimately allowed defense counsel to reveal to the jury only that SR had lied to Mr. Smith in unspecified ways about unspecified conduct that she believed involved a violation of cadet regulations and possibly the UCMJ (but for which prosecutors had indicated they would not prosecute her). *See* App. 4a-5a, 19a & n.6; CAAF J.A. 145, 148-149.

3. Following a week-long trial, the jury acquitted Mr. Smith on six of the ten charges. *See* CAAF J.A. 173-174. It convicted on the other four, as well as on a lesser-included offense of one of the six counts of acquittal. *See id.*; App. 2a. The three convictions that pertained to sexual conduct (sodomy, indecent assault, and extortion of sexual favors) were all based on the allegations by SR, whose credibility—including motive to lie—the defense was not permitted to explore fully.

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[6] SR, the only other apparent source of evidence on the point, invoked her privilege against self-incrimination and thus did not testify at the pre-trial hearing on the proposed cross-examination *See* App. 4a, 54a, 59a; CAAF J.A. 177-178. Although she dropped that invocation in order to testify at trial, the military judge did not require her, upon waiving the privilege, to address whether in fact she had made a prior false accusation so that he could revisit his ruling on the proposed cross-examination in the event she corroborated Mr. Smith's testimony by admitting that she had.

By contrast, the jury acquitted Mr. Smith of every sex-related charge on which his accuser was subject to full cross-examination. The verdict also meant that the government had failed to prove even one of the original sex-related charges that Academy officials had leveled against Mr. Smith. All of those charges were either dismissed before trial (many as lacking any foundation, *see supra* p.3) or resulted in acquittal.

The jury sentenced Mr. Smith to six months' confinement, forfeiture of all pay and allowances, and dismissal from the Coast Guard (i.e., expulsion from the Academy). *See* App. 2a; CAAF J.A. 175. Mr. Smith served his period of confinement immediately after trial, earning release a month early for good behavior.[7]

4. After the Coast Guard Court of Criminal Appeals affirmed his convictions and sentence—over a lengthy dissent regarding the restriction on the cross-examination of SR, *see* App. 40a-58a—Mr. Smith petitioned CAAF for further review. CAAF granted review of the Sixth Amendment question, but following briefing and argument it affirmed by a splintered 3-2 vote. *See* App. 1a-21a.

In presenting his Confrontation Clause claim, Mr. Smith argued that because he was raising a constitutional challenge to the military judge's ruling, CAAF should review the ruling de novo rather than for abuse of discretion. In support of that argument, Mr. Smith

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[7] Following his release, Mr. Smith returned to his home state of Texas, where he has completed his undergraduate work, married, become a father, and remained steadily employed. Upon his return, however, Mr. Smith was also forced to register as a sex offender, as Texas law mandates lifelong registration for indecent-assault convictions.

cited cases from several circuits that employ de novo review of Confrontation Clause claims like his. Writing for a two-judge plurality, Judge Stucky rejected that position, holding that under CAAF precedent, review was only for abuse of discretion. *See* App. 5a (citing *United States* v. *Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006), and *United States* v. *Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005)).[8]

Applying that standard, the plurality concluded that "[t]he military judge did not abuse his discretion." App. 7a. The plurality deemed it significant that the defense had been allowed to show the jury that SR had lied to Mr. Smith about conduct that she believed could have threatened her career. *See id.* The plurality also reasoned that "[w]hile Cadet SR's credibility was in contention, it is unclear why the lurid nuances of her sexual past would have added much to Appellant's extant theory of fabrication." *Id.* Finally, the plurality sought to distinguish cases cited by Mr. Smith, including this Court's decision in *Olden* v. *Kentucky*, 488 U.S. 227 (1988) (per curiam), that held comparable restrictions on the cross-examination of key prosecution witnesses to be unconstitutional. *See* App. 7a-8a; *see also* App. 29a-31a (court of criminal appeals majority seeking to distinguish other CAAF cases with similar holdings).

Judge Baker, also applying the abuse-of-discretion standard, concurred in the result. *See* App. 8a-10a. He

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[8] CAAF has long applied this standard to Confrontation Clause claims. *See, e.g.*, *United States* v. *Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009); *United States* v. *Shaffer*, 46 M.J. 94, 98 (C.A.A.F. 1997); *United States* v. *Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996).

acknowledged that the military judge's ruling might well have violated the Confrontation Clause on the theory that the jury "needed to know the nature of 'the secret' in order to assess beyond a reasonable doubt whether SR might succumb to pressure to protect the secret." App. 9a. But in his view, Mr. Smith's alternate "theory of admission [wa]s too far-fetched to pass constitutional ... muster." *Id.*[9]

Judge Erdmann, joined by Chief Judge Effron, agreed that CAAF "review[s] a military judge's decision to admit or exclude evidence for an abuse of discretion." App. 13a (citing *United States* v. *Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). But they dissented from the other judges' application of that standard. *See* App. 10a-21a. The fatal problem in their view was that "the military judge prevented the defense from presenting to the panel an explanation of the circumstances that would have provided a motive for the complainant to make a false allegation of" sexual assault. App. 10a; *see also* App. 21a ("Smith had a commonsense explanation

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[9] Two of Judge Baker's articulated bases for this conclusion were factually incorrect. First, Judge Baker stated that "it was SR herself who reported her sexual contact with Appellant; this cuts against Appellant's theory that SR would lie to conceal her own misconduct." App. 9a. In fact, "[t]he record does not disclose whether SR voluntarily came forward or was first approached by" Coast Guard investigators. App. 52a n.8 (court of criminal appeals dissent); *see also* App. 51a-53a. Second, Judge Baker stated that "to support [Mr. Smith's] theory of admission the members needed to know that SR had 'lied' to Appellant about her sexual misconduct," and "[t]his much the military judge permitted." App. 9a. To the contrary, the military judge did not permit the jury to hear that what "SR had 'lied' to Appellant about [was] sexual misconduct." *Id.* Indeed, that prohibition was the crux of Mr. Smith's challenge on appeal.

for SR's claim that the sexual activity was nonconsensual and the military judge's ruling prevented the members from considering this theory."). Emphasizing that "this was a 'he said-she said' case and for the charges at issue in this appeal, the critical question for the members was the credibility of the sole prosecution witness," App. 17a (footnote omitted), the dissenters concluded—relying on this Court's precedent—that a Sixth Amendment violation had occurred because "'[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination,'" App. 14a-15a (alterations in original) (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986)); *accord* App. 41a (court of criminal appeals dissent) ("The excessive restrictions imposed on Appellant's Sixth Amendment confrontation rights allowed SR to testify through non-factual euphemisms on critical issues related to the Government's proof and her own credibility, and allowed the Government to create a substantially different impression of her truthfulness than what the defense had sought to show through the excluded evidence.").

The dissenters also disagreed with the plurality that the cross-examination allowed by the military judge was sufficient, explaining that "[w]ith this limited information about SR's secret, the members were left to speculate whether the secret was a minor disciplinary infraction or a more serious charge, but they had no idea that the proffered evidence directly implicated SR's motive and credibility." App. 19a-20a; *see also* App. 45a-46a (court of criminal appeals dissent) (citing *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974), and *Olden*, 488 U.S. at 232 (per curiam)). As to the plurality's stated doubt about the need for the "lurid nu-

ances" of SR's secret, App. 7a, the dissenters explained that what was important about the proposed cross-examination, and what its focus would have been, was "not the lurid nuances of the victim's sexual past ..., but rather the allegation that SR had previously lied about a sexual encounter under similar circumstances." App. 18a (internal quotation marks omitted).[10]

REASONS FOR GRANTING THE PETITION

CAAF's holding regarding the appropriate standard for appellate review of Confrontation Clause claims like Mr. Smith's conflicts with the holdings of several other courts of appeals. The conflict is established and the issue is both recurring and important. Moreover, this case is a good vehicle for resolving the conflict, both because the issue was raised throughout the case and because CAAF's splintered decision applying abuse-of-discretion review shows that the use of that relatively lax standard may well have determined the outcome here. Finally, CAAF's use of an abuse-of-discretion standard is wrong, as Mr. Smith had a right to plenary appellate review of his constitutional claim raising a mixed question of law and fact. Under these circumstances, this Court's review is warranted.

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[10] In addition to defending the merits of the military judge's ruling, the government raised a jurisdictional objection before CAAF, contending that Mr. Smith's petition for discretionary review by that court was untimely. CAAF unanimously rejected that argument. *See* App. 2a-3a (plurality opinion), 10a (dissent), 8a-10a (Baker, J., concurring in the result) (implicitly rejecting the jurisdictional argument by addressing the merits).

I. CAAF'S STANDARD-OF-REVIEW HOLDING IMPLICATES AN ESTABLISHED CIRCUIT CONFLICT ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

A. The Courts Of Appeals Are Deeply Divided Over What Standard Of Review Applies To Confrontation Clause Claims Like Mr. Smith's

CAAF employed abuse-of-discretion review in resolving Mr. Smith's Sixth Amendment challenge to the military judge's restriction on the defense's cross-examination of SR. *See, e.g.*, App. 5a. That approach conflicts with the holdings of five circuits, which consider comparable Confrontation Clause claims de novo, reserving abuse-of-discretion review for non-constitutional challenges. For example, the Seventh Circuit has stated that "[o]rdinarily, a district court's evidentiary rulings are reviewed for abuse of discretion. However, when the restriction [on cross-examination] implicates the criminal defendant's Sixth Amendment right to confront witnesses against him, ... the standard of review becomes de novo." *United States* v. *Smith*, 308 F.3d 726, 738 (7th Cir. 2002) (citation omitted). The First, Fifth, Eighth, and Tenth Circuits have adopted the same approach. *See, e.g.*, *United States* v. *Vega Molina*, 407 F.3d 511, 522 (1st Cir. 2005); *United States* v. *Jimenez*, 464 F.3d 555, 558-559 (5th Cir. 2006); *United States* v. *Bentley*, 561 F.3d 803, 808 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1275 (2009); *United States* v. *Montelongo*, 420 F.3d 1169, 1173 (10th Cir. 2005).[11]

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[11] In *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), the Ninth Circuit stated that it was adopting an approach that "br[ought it] in line with [these five] sister circuits,"

Six other circuits, by contrast—the Second, Third, Fourth, Sixth, Eleventh, and District of Columbia Circuits—take the same approach that CAAF does, applying abuse-of-discretion review even when a restriction on the cross-examination of a prosecution witness is attacked on constitutional grounds.[12] The Sixth Circuit, for example, stated in one case that "[defendant] argues that his right to confrontation was violated when the trial court 'unfairly' limited his cross-examination of [a] government witness .... We review the district court's restriction on a defendant's right to cross-examine witnesses for abuse of discretion." *United States* v. *Franco*, 484 F.3d 347, 353 (6th Cir. 2007). Cases from the other circuits in this group are to the same effect. *See, e.g.*, *United States* v. *Rosa*, 11 F.3d 315, 335 (2d Cir. 1993); *United States* v. *Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008); *United States* v. *Shelton*, 200 F. App'x 219, 221 (4th Cir. 2006) (citing *United States* v. *Scheetz*,

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id. at 1101 n.6 (citing a case from each of the five). The court's actual holding, however, was that abuse-of-discretion review is proper for some constitutional challenges, specifically those addressing "a limitation on the scope of questioning within a given area" rather than "the exclusion of an [entire] area of inquiry." *Id.* at 1101.

[12] The dissenters stated in this case that under the abuse-of-discretion standard, conclusions of law are reviewed de novo. App. 13a. The authority they cited for that statement, however, *United States* v. *Ayala*, involved a suppression ruling rather than a restriction on cross-examination. *See* 43 M.J. at 298. To petitioner's knowledge, no CAAF case states that the abuse-of-discretion standard repeatedly applied by the court when reviewing restrictions on defendants' cross-examination includes de novo review of legal conclusions. Nor did the plurality or the concurring judge here indicate that any aspect of their review was conducted de novo.

293 F.3d 175, 184 (4th Cir. 2002)); *United States* v. *Orisnord*, 483 F.3d 1169, 1178 (11th Cir. 2007); *United States* v. *Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996).[13]

In short, CAAF's use of an abuse-of-discretion standard in this case perpetuates a clear—and recognized—conflict in the circuits. *See United States* v. *Larson*, 495 F.3d 1094, 1100 & n.5 (9th Cir. 2007) (en banc) (resolving "an intra-circuit conflict regarding the standard of review for Confrontation Clause challenges to a trial court's limitations on cross-examination" while acknowledging a parallel "disagreement among the circuits").

B. The Question Presented Is Recurring And Important, And This Case Is A Good Vehicle For Deciding It

The circuit conflict at issue here warrants resolution by this Court. As indicated by the cases cited in the previous section, the constitutionality of restrictions on cross-examination arises frequently in criminal

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[13] A few unpublished decisions from some of the circuits in this group have reviewed restrictions on cross-examination de novo, notwithstanding (and without acknowledging) the contrary precedent cited in the text. *See, e.g., United States* v. *Allen*, 353 F. App'x 352, 354 (11th Cir. 2009) (per curiam); *United States* v. *Askanazi*, 14 F. App'x 538, 540 (6th Cir. 2001) (per curiam). Other cases, addressing other types of Confrontation Clause claims, have proclaimed in dicta that all such claims are subject to de novo review—again without confronting the cases cited in the text. *See, e.g., United States* v. *Jass*, 569 F.3d 47, 55 (2d Cir. 2009) (*Bruton* claim: "We review '[a]lleged violations of the Confrontation Clause ... *de novo*[.]'" (alteration and omission in original) (quoting *United States* v. *Vitale*, 459 F.3d 190, 195 (2d Cir. 2006))), *cert. denied*, 130 S. Ct. 2128 (2010); *United States* v. *Hardy*, 586 F.3d 1040, 1043 (6th Cir. 2009) (similar for admission of affidavit).

prosecutions, and in every part of the country. Those cases also show that the conflict over the standard for appellate review of such restrictions is established; there is thus no benefit to be gained by giving the lower courts additional time to consider the issue. Moreover, the question presented is important, because the standard of review can determine the outcome of an appeal. *See Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 238 (1991) ("[T]he difference between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree." (internal quotation marks omitted)); *see also, e.g.*, *News-Press* v. *United States Dep't of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007) ("In even moderately close cases, the standard of review may be dispositive of an appellate court's decision."); 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 1.02, at 1-16 (3d ed. 1999). That is particularly true when one standard is highly deferential: CAAF, for example, has stated that "the abuse of discretion standard is a strict one," satisfied only when "[t]he challenged action [is] arbitrary, fanciful, clearly unreasonable, or clearly erroneous," *United States* v. *McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks omitted). Finally, disuniformity created by the conflict directly affects a fundamental individual right. Some defendants in criminal cases enjoy less protection of the critical right to confront their accusers because of the fortuity of where their trials were held—or, as to cases decided by CAAF, because they have chosen to wear the nation's uniform.

This case presents a good vehicle to resolve the circuit conflict. To begin with, Mr. Smith's standard-of-review argument was both pressed and passed upon in the court of appeals, *see* Pet'r's CAAF Br. 12-13; App.

5a, rendering the issue suitable for review by certiorari. *See, e.g., Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (quoting *United States* v. *Williams*, 504 U.S. 36, 41 (1992)). In addition, CAAF's rejection of Mr. Smith's argument may well have determined the ultimate outcome. Even applying highly deferential review, CAAF was narrowly divided as to the constitutionality of the military judge's ruling in this case. If even one of the three judges who deemed that ruling not to be an abuse of discretion were to conclude, upon reviewing without deference, that it was inconsistent with the Sixth Amendment, Mr. Smith would prevail.[14]

II. CAAF'S STANDARD-OF-REVIEW HOLDING IS WRONG

This Court's review is also warranted because CAAF's use of an abuse-of-discretion standard to review Mr. Smith's Confrontation Clause claim was erroneous. The military judge's ruling that Mr. Smith challenged presented a mixed question of law and fact. When a constitutional right is involved, as here, this Court has repeatedly held de novo review of such mixed questions appropriate. The decisions from this Court that CAAF and other courts have relied on to justify abuse-of-discretion review are inapposite.

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[14] The military context in which this case arises does not affect its suitability as a vehicle to answer the question presented. Although servicemembers' constitutional rights can be more circumscribed than those of their civilian counterparts when morale, good order and discipline, or other military interests so require, *see Parker* v. *Levy*, 417 U.S. 733, 758 (1974), that is not the case here. CAAF has never articulated a military-specific rationale for employing abuse-of-discretion review in cases like this (nor did the government offer one below), and in fact no military interest would be undermined if CAAF reviewed constitutional challenges to restrictions on defendants' cross-examination without deference.

A. Under This Court's Precedent, Mixed Questions Of Law And Fact Are Reviewed De Novo When Constitutional Rights Are Involved

The military judge's restriction on the cross-examination of SR involved a quintessential "mixed question[] of law and fact—*i.e.*, [a] question[] in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the ... standard." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982). Under this Court's cases, such questions are reviewed de novo when, as here, they implicate constitutional rights. As a plurality explained in *Lilly* v. *Virginia*, 527 U.S. 116 (1999), the Court's "prior opinions ... indicate that ... with ... fact-intensive, mixed questions of constitutional law, ... '[i]ndependent review is ... necessary ... to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights," *id.* at 136 (alteration and last two omissions in original) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996)); *see also United States* v. *Bajakjian*, 524 U.S. 321, 337 n.10 (1998) (employing de novo review because the pertinent issue "calls for the application of a constitutional standard to the facts of a particular case"); *Pullman-Standard*, 456 U.S. at 290 n.19 ("There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court." (citations omitted)); *United States* v. *Frederick*, 182 F.3d 496, 499 (7th Cir. 1999) (Posner, J.) (noting that this Court has embraced de novo review of mixed questions involving "certain constitutional issues"); *United States* v. *McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc) ("The pre-

dominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights." (citing *Ker* v. *California*, 374 U.S. 23 (1963))).[15]

The Court has thus held that de novo review—though with deference typically given to associated factual findings—is appropriate for a wide variety of trial court rulings that implicate constitutional rights. These include rulings on: whether a hearsay statement bears sufficient indicia of "trustworthiness" to satisfy the Confrontation Clause, *see Lilly*, 527 U.S. at 136 (plurality opinion); whether a fine is unconstitutionally excessive, *see Bajakjian*, 524 U.S. at 336 n.10; whether police had probable cause or reasonable suspicion to conduct a search, *see Ornelas*, 517 U.S. at 699; whether a defendant was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *see Thompson* v. *Keohane*, 516 U.S. 99, 112-113 (1995); whether a confession was voluntary, *see Arizona* v. *Fulminante*, 499 U.S. 279, 287 (1991) (citing *Miller* v. *Fenton*, 474 U.S. 104, 110 (1985)); whether defense counsel was constitutionally ineffective, *see Strickland* v. *Washington*, 466 U.S. 668, 698 (1984); whether a pre-trial identification proce-

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[15] Where constitutional rights are not implicated, "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll.*, 499 U.S. at 233; *see also Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (adopting deferential review of rulings under Federal Rule of Civil Procedure 11); *Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988) (citing other examples); *Pullman-Standard*, 456 U.S. at 290 n.19 (citing examples of both approaches).

dure was unconstitutionally suggestive, *see Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (per curiam); whether a defendant waived his right to counsel, *see Brewer* v. *Williams*, 430 U.S. 387, 403-404 (1977); and several First Amendment questions, *see Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 685-686 n.33 (1989) (citing cases).[16]

The Court's rationale for these various holdings supports de novo review here. *First*, the Court has repeatedly observed in these cases that "the [relevant] legal rules ... acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the le-

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[16] Although some of these cases involved review of state-court judgments, their standard-of-review holdings apply equally to federal cases like this one. *See Lilly*, 527 U.S. at 136 (plurality opinion) (relying on *Ornelas*, a federal criminal case, to support its standard-of-review holding in a state criminal case); *see also Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[S]urely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts."). That is true even for decisions from this Court on federal habeas review of a state-court judgment. While those cases' standard-of-review holdings generally do not apply in the habeas context post-AEDPA, *see Williams* v. *Taylor*, 529 U.S. 362, 411 (2000) (citing 28 U.S.C. § 2254(d)(1)), they remain valid and instructive for cases on direct review (state or federal). *See Ornelas*, 517 U.S. at 697 (citing *Miller*, a state-habeas case, to support its standard-of-review holding in a direct-review case); *see also, e.g.*, *United States* v. *LeBrun*, 363 F.3d 715, 719 (8th Cir. 2004) (en banc) ("*Thompson*'s rationale [in the habeas context] requires that on direct appeal we review the district court's custody determination de novo."); *United States* v. *Erving L.*, 147 F.3d 1240, 1245 (10th Cir. 1998) (similar, citing *Derrick* v. *Peterson*, 924 F.2d 813, 818 (9th Cir. 1991)).

gal principles." *Ornelas*, 517 U.S. at 697, *quoted in, e.g.*, *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *accord Miller*, 474 U.S. at 114. The same is true of the Sixth Amendment "rules" that apply to restrictions on the cross-examination of prosecution witnesses. *Second*, the Court has stated in the search-and-seizure context that a

> policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law.

Ornelas, 517 U.S. at 697 (alterations in original) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 171 (1949)). Again, the same is true as to the Confrontation Clause.

More generally, this Court has explained that plenary appellate review of constitutional mixed questions "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-511 (1984); *see also id.* at 503 ("When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance."). That is surely true of a defendant's right to confront the witnesses against him through cross-examination: This Court has labeled cross-examination "the greatest legal engine ever invented for the discovery of truth."

California v. *Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted). It has also deemed the right of confrontation to be "one of the fundamental guarantees of life and liberty," *Kirby* v. *United States*, 174 U.S. 47, 55 (1899), and so "fundamental and essential to a fair trial" as to be incorporated against the States, *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). And it has stated that an impermissible restriction on a defendant's right of cross-examination is "constitutional error of the first magnitude." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974). Deferential review of trial-court rulings is insufficient to safeguard such a critical constitutional right.[17]

Finally, this Court's cases support the specific approach espoused by Mr. Smith and adopted by several circuits, whereby non-constitutional challenges to restrictions on cross-examination are reviewed for abuse of discretion while constitutional challenges are reviewed de novo. In *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, the Court adopted the same approach for punitive damages awards. "If no constitutional issue is raised" regarding the excessiveness of such an award, the Court stated, "the role of the appel-

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[17] Decisions outside the mixed-question context reinforce the conclusion that de novo review is appropriate here. For example, in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), this Court construed a statutory provision mandating abuse-of-discretion review of certain individual immigration decisions. *See id.* at 485-486 & n.6 (discussing 8 U.S.C. § 1160(e)). The Court held that the statute did not preclude judicial review of due process challenges to the broader immigration program—and part of its rationale was that "the abuse-of-discretion standard ... does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts." *Id.* at 493.

late court ... is merely to review the trial court's [excessiveness] 'determination under an abuse-of-discretion standard.'" 532 U.S. at 433 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)). By contrast, the Court went on to hold (relying on *Ornelas* and *Bajakajian*), "courts of appeals should apply a *de novo* standard of review when passing on ... the constitutionality of punitive damages awards." *Id.* at 436.

What all these cases recognize is the anomaly of employing an abuse-of-discretion standard when the issue is whether or not a particular ruling violated a constitutional right. Such a standard suggests that a district court has "discretion" to commit a constitutional violation, and that appellate judges could uphold a ruling even if they believe that such a violation occurred. *See, e.g., Elcock* v. *Kmart Corp.*, 233 F.3d 734, 743 (3d Cir. 2000) ("Of course, an abuse of discretion means much more than that the appellate court disagrees with the trial court."). That is plainly wrong.

B. The Cases Relied On By Courts That Employ Abuse-Of-Discretion Review Do Not Support That Approach

The circuits that have reviewed Confrontation Clause challenges to restrictions on cross-examination deferentially have not addressed the cases discussed in the previous section. They have instead relied on other decisions by this Court that supposedly endorse abuse-of-discretion review. That reliance is misplaced.

To begin with, several circuits have based their choice of deferential review on language in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). *See, e.g., Rosa*, 11 F.3d at 335; *United States* v. *Mussare*, 450 F.3d 161, 169 (3d Cir. 2005). But what the Court said in the rele-

vant portion of *Van Arsdall* is that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." 475 U.S. at 679. That statement reveals nothing about the proper appellate standard of review. It instead addresses the substance of the Confrontation Clause, and in particular it rejects the notion that that clause, as a substantive matter, proscribes any restrictions on defendants' cross-examination. This is clear from the immediately preceding sentence, in which the Court stated that "[i]t does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Id.* It is also clear from the next few paragraphs, where the Court went on to find that a Confrontation Clause violation had occurred—without ever referring to abuse of discretion. *See id.* at 679-680.[18]

The Sixth Circuit has also relied on this Court's statement in *General Electric Co.* v. *Joiner*, 522 U.S. 136, 141 (1997), that "abuse of discretion is the proper

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[18] The Ninth Circuit similarly relied on *Van Arsdall* in holding that the standard of review depends on the details of the defendant's Confrontation Clause challenge, i.e., that de novo review applies when the trial court "exclu[des] ... an [entire] area of inquiry," but not when it limits "the scope of questioning within a given area." *Larson*, 495 F.3d at 1101. As just discussed, however, *Van Arsdall* addressed only the substance of the confrontation guarantee. The Ninth Circuit's holding, moreover, improperly conflates substance with the standard of review.

standard of review of a district court's evidentiary rulings." *See United States* v. *Schreane*, 331 F.3d 548, 564 (6th Cir. 2003) (citing *Joiner* for the proposition that "[a]n appellate court reviews all evidentiary rulings—including constitutional challenges to evidentiary rulings—under the abuse-of-discretion standard"). *Joiner* was not a criminal case, however, and thus did not implicate the Confrontation Clause. Moreover, the relevant ruling in *Joiner* was not a constitutional one but rather a ruling on the exclusion of expert testimony under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See Joiner*, 522 U.S. at 138-139. The same is true of the cases *Joiner* cited to support its statement that evidentiary rulings are reviewed for abuse of discretion; each likewise concerned a non-constitutional ruling by the trial judge. *See Old Chief* v. *United States*, 519 U.S. 172, 180 (1997) (balancing under Federal Rule of Evidence 403 in regard to admission of defendant's prior conviction); *United States* v. *Abel*, 469 U.S. 45, 54-55 (1984) (same in regard to admission of government rebuttal testimony); *Spring Co.* v. *Edgar*, 99 U.S. 645, 658 (1879) (admission of expert testimony). In light of the mixed-question precedent from this Court discussed in the previous section, *Joiner*'s reference to "evidentiary rulings" is most sensibly read to refer only to non-constitutional rulings. *Joiner* is thus consistent with Mr. Smith's contention that non-constitutional challenges to restrictions on cross-examination should be reviewed for abuse of discretion while constitutional claims should be reviewed de novo.

CAAF's deferential review in cases like this, meanwhile, traces to *Geders* v. *United States*, 425 U.S. 80 (1976), and *Alford* v. *United States*, 282 U.S. 687 (1931). *See, e.g., United States* v. *Williams*, 37 M.J. 352, 361

(C.M.A. 1993) (citing *Geders*); *United States* v. *Hooper*, 26 C.M.R. 417, 426 (C.M.A. 1958) (citing *Alford*). Neither case supports deferential review of constitutional challenges. The Court in *Alford* did review a restriction on cross-examination for abuse of discretion, *see* 282 U.S. at 694, but nothing in its opinion indicates that the defendant's attack on the restriction was constitutionally based. Indeed, the opinion never mentions either the Sixth Amendment generally or the Confrontation Clause in particular. Not until decades later did this Court state that *Alford*'s holding included a "constitutional dimension," *Davis*, 415 U.S. at 318 n.6 (citing *Smith* v. *Illinois*, 390 U.S. 129, 132-133 (1968))—and in doing so it plainly recognized the inconsistency between that "constitutional dimension" and *Alford*'s use of abuse-of-discretion review, *see id.* ("*Although* ... we reversed [in *Alford*] because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in *Alford* is not in doubt." (emphasis added)).

Geders provides even less support for CAAF's use of deferential review. The Court in *Geders* did not review a restriction on cross-examination, nor say that such restrictions are reviewed for abuse of discretion. It stated that a trial judge's determination regarding "the order in which parties will adduce proof"—a nonconstitutional matter—"will be reviewed only for abuse of discretion." 425 U.S. at 86. In the next sentence the Court, citing *Glasser* v. *United States*, 315 U.S. 60, 83 (1942), noted that, "[w]ithin limits, the judge may ... control the scope of examination of witnesses," *Geders*, 425 U.S. at 86-87. But while *Glasser* did review a restriction on cross-examination for abuse of discretion, as with *Alford* there is no indication in *Glasser* (the relevant portion of which totals only three sentences) that the defendant had raised a constitutional challenge.

See Glasser, 315 U.S. at 83.[19] Again, then, this Court's precedent is consistent with the approach used by five courts of appeals and urged by Mr. Smith here. In any event, to the extent these cases reflect any uncertainty on the question presented, that is an additional factor weighing in favor of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL S. VOLCHOK
Counsel of Record
SETH P. WAXMAN
A. STEPHEN HUT, JR.
EDWARD C. DUMONT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000
daniel.volchok@wilmerhale.com

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[19] The Court in *Geders* also cited *United States* v. *Nobles*, 422 U.S. 225 (1975), but *Nobles* did not involve the Confrontation Clause. The issue there was whether the defense had to disclose certain material in order to permit adequate cross-examination by the *prosecution*. *See Nobles*, 422 U.S. at 227; *see also id.* at 241 (labeling the defendant's invocation of the Sixth Amendment "misconceive[d]").

No. 10-18

In the Supreme Court of the United States

WEBSTER M. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces applied the correct standard of review to petitioner's claim that the military judge's limitation on the cross-examination of a government witness violated the Confrontation Clause of the Sixth Amendment.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-21a) is reported at 68 M.J. 445. The opinion of the United States Coast Guard Court of Criminal Appeals (Pet. App. 23a-58a) is reported at 66 M.J. 556. The order of the military judge (Pet. App. 59a-64a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on March 29, 2010. The petition for a writ of certiorari was filed on June 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of one specification of sodomy, in violation of Article 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925; one specification of extortion, in violation of Article 127 of the UCMJ, 10 U.S.C. 927; one specification of indecent assault, in violation of Article 134 of the UCMJ, 10 U.S.C. 934; one specification of attempting to disobey a lawful order, in violation of Articles 80 and 92 of the UCMJ, 10 U.S.C. 880, 892; and one specification of absence without leave, in violation of Article 86 of the UCMJ, 10 U.S.C. 886. Pet. App. 23a-24a. The members sentenced petitioner to dismissal from the Coast Guard, six months' confinement, and forfeiture of all pay and allowances. *Id.* at 24a. The convening authority approved the sentence as adjudged. *Ibid.* The United States Coast Guard Court of Criminal Appeals affirmed. *Id.* at 23a-58a. On discretionary review, the United States Court of Appeals for the Armed Forces (CAAF) also affirmed. *Id.* at 1a-21a.

1. Petitioner is a former Coast Guard Academy cadet. Pet. App. 3a. In 2005, he and a female classmate, referred to in the petition appendix as "SR," were assigned to neighboring vessels in Norfolk, Virginia as part of the Academy's cadet summer training program. *Ibid.* While there, SR engaged in activity that violated Coast Guard regulations and the UCMJ, and thereby potentially jeopardized her career. *Ibid.*; *id.* at 60a, 62a. Petitioner heard rumors about the incident and contacted SR. *Id.* at 3a. SR discussed the situation with petitioner but, as she later admitted, lied about some of the details to make herself look better. *Id.* at 3a, 26a. Petitioner assured SR that he would "try to squash [the] rumors." *Id.* at 3a.

After they had returned to the Academy in the fall, petitioner contacted SR again and told her he was still hearing the rumors. Pet. App. 3a, 26a, 60a. At this point, SR told petitioner the whole truth about the incident, out of fear that he would otherwise stop helping her. *Id.* at 26a. Petitioner said that he would need "motivation" to continue helping SR to suppress the rumors. *Id.* at 3a, 26a; C.A. App. 200. Although denying that he was demanding sexual favors, petitioner proposed that he and SR take a nude photograph together as a sign of trust. Pet. App. 3a-4a. SR permitted petitioner to take the photograph in her room that evening. *Id.* at 4a, 26a.

Petitioner returned to SR's room later that night. Pet. App. 4a. He laid down in her bed, fondled her breast, and inserted his fingers into her vagina. C.A. App. 133-136, 201; Pet. App. 4a. Petitioner then performed oral sex on SR, after which SR performed oral sex on petitioner. C.A. App. 135-138; Pet. App. 4a, 60a.

Petitioner claimed that this sexual activity was consensual—an assertion that, if true, would have meant that both he and SR violated Coast Guard regulations against consensual sexual activity in Academy barracks. See Pet. 4; C.A. App. 188-189 (regulations). SR, however, explained that she had verbally objected to petitioner's actions. *Id.* at 134-135. She further explained that she went along only because she was "scared to upset him because he had a big secret of mine." Pet. App. 26a; C.A. App. 137.

2. a. Following an investigation into this and other alleged misconduct involving petitioner, the prosecuting authority determined that ten specifications against petitioner should be tried by general court-martial. C.A. App. 89-98. Three of the specifications concerned petitioner's activities with SR: one specification of sodomy,

in violation of Article 125 of the UCMJ, 10 U.S.C. 925; one specification of extortion, in violation of Article 127 of the UCMJ, 10 U.S.C. 927; and one specification of indecent assault, in violation of Article 134 of the UCMJ, 10 U.S.C. 934. C.A. App. 95. Petitioner was also charged with an additional specification of sodomy; an additional specification of extortion; one specification of absence without leave, in violation of Article 86 of the UCMJ, 10 U.S.C. 886; one specification of disobeying a lawful order, in violation of Article 92 of the UCMJ, 10 U.S.C. 892; one specification of rape, in violation of Article 120 of the UCMJ, 10 U.S.C. 920; one specification of assault, in violation of Article 128 of the UCMJ, 10 U.S.C. 928; and one specification of unlawful entry, in violation of Article 134 of the UCMJ, 10 U.S.C. 934. C.A. App. 91, 92, 95.

b. Before the court-martial, petitioner filed a motion seeking to introduce evidence of SR's sexual history. Pet. App. 59a. According to petitioner, the incident that SR had been trying to keep secret was a sexual encounter with an enlisted man. *Id.* at 27a. Petitioner claimed that SR had originally told petitioner that the encounter involved only oral sex and was not consensual, but had admitted in the fall that the encounter included intercourse and was consensual. *Ibid.*

Petitioner did not dispute that this evidence was presumptively barred by Military Rule of Evidence (M.R.E.) 412, which generally prohibits the introduction in a sexual-misconduct case of evidence "offered to prove that any alleged victim engaged in other sexual behavior." M.R.E. 412(a)(1); see Pet. App. 61a; C.A. App. 179-181. Petitioner argued, however, that the evidence was admissible under the Rule's exception for "evidence the exclusion of which would violate the constitutional rights of

the accused." M.R.E. 412(b)(1)(C); see Pet. App. 61a; C.A. App. 180-181.

As required by the Rule, see M.R.E. 412(c)(3), the military judge held a closed evidentiary hearing on petitioner's motion. Pet. App. 60a. Petitioner testified about his claims regarding the nature of SR's secret. *Id.* at 59a; C.A. App. 107-108. After being informed of her rights against compulsory self-incrimination, SR declined to testify at the hearing. *Id.* at 100, 177-178; see UCMJ Art. 31(b), 10 U.S.C. 831(b).

c. The military judge denied petitioner's motion in a written order, rejecting "several theories" offered by petitioner for admitting evidence of SR's sexual history. Pet. App. 59a-64a. The military judge determined that the evidence was not admissible for the purpose of impeaching SR's credibility generally, reasoning that SR's unwillingness to admit unlawful activity to petitioner was not very probative of her character for truthfulness; that members (the military equivalent of jurors) might well consider the evidence improperly "for its tendency to prove that [SR] is a bad person"; and that "conflicting testimony on this point * * * could easily sidetrack members" from focusing on the charged offenses. *Id.* at 62a. The military judge further determined that the sexual-history evidence was not admissible in order for the members to assess how far SR might go to protect her secret, because the members "could be informed that the secret was information that if revealed could have an adverse impact on her Coast Guard career, including possibly disciplinary action under the UCMJ." *Ibid.*

Finally, the military judge determined that the evidence was not admissible to show that SR "has a propensity to bring false accusations against men with whom she has had consensual sexual encounters," because its

"minimal probative value" was "outweighed by danger of unfair prejudice to [SR]'s privacy interests and the potential danger of sidetracking the member[s'] attention to a collateral issue." Pet. App. 63a, 64a. The military judge noted that the evidence was "not strong since it comes from the accused, who has an obvious bias." *Id.* at 63a. "More important," the military judge continued, the alleged prior sexual misconduct did not involve "an official complaint." *Ibid.* "[E]ven if [SR] falsely told [petitioner] *in confidence* that her sexual encounter with the enlisted man was non-consensual *in an effort to suppress rumors*," the military judge reasoned, "this would have little value in proving that her *official* allegations against [petitioner] *resulting in a public trial* are also false." *Id.* at 64a.

d. During the court-martial, SR testified on direct examination that she had been involved in a "bad situation" during the summer of 2005 that she believed could threaten her career and jeopardize her ranking. C.A. App. 124. She further testified that she did not reveal the "whole situation" to petitioner at first. *Id.* at 125.

On cross-examination, defense counsel elicited from SR that, to convince petitioner to help her, she had initially "lie[d] to" him by omitting details about her prior conduct that painted her in "a bad light." C.A. App. 148-149. In accordance with the pre-trial ruling, the military judge did not permit the defense to cross-examine SR about the specific details of her secret.

e. The members found petitioner guilty on all three specifications—sodomy, extortion, and indecent assault—relating to his conduct with SR. C.A. App. 173-174. They also found petitioner guilty of leaving his place of duty and attempting to disobey an order. *Ibid.* They acquitted him of the remaining charges. *Ibid.* Petitioner

was sentenced to six months of confinement, dismissal from the Coast Guard, and forfeiture of all pay and allowances. *Id.* at 175.

3. The United States Coast Guard Court of Criminal Appeals affirmed. Pet. App. 23a-58a. As relevant here, petitioner argued on appeal that the military judge had violated his rights under the Confrontation Clause of the Sixth Amendment "by limiting his cross-examination of SR." *Id.* at 24a. The court majority reviewed that claim de novo, pursuant to its statutory obligation to affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." UCMJ Art. 66(c), 10 U.S.C. 866(c); see Pet. App. 25a & n.7; see also *United States* v. *Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (Article 66(c) confers "*de novo* power of review").

Applying that de novo standard, the majority found "no error in the military judge's ruling" limiting the scope of cross-examination. Pet. App. 33a. It recognized that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 28a (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986)). Petitioner, it determined, had the opportunity "to attack SR's credibility by means of showing a prior lie"; "to show" by means other than sexual-history evidence "that SR had a motive to lie in her testimony against" petitioner; and to "portray[] [SR] as the architect of a scheme of false allegations intended to cover up her own misconduct." *Id.* at 31a-32a (internal quotation marks omitted).

That SR's previous lie was allegedly about her sexual history "was no more than superficially relevant, was not

material, and was not vital to [petitioner's] defense." Pet. App. 33a; see *id.* at 28a (confrontation right violated only if excluded evidence is "relevant," "material," and "vital" to defense). In particular, the court rejected any "parallel" between SR's motivation to lie to petitioner about sexual activity with an enlisted man and her motivation to lie to the authorities, and under oath, about her sexual activity with petitioner. *Id.* at 31a. In the former situation, where there were rumors of misconduct, "it is fair to argue" that "avoiding discipline" motivated SR to lie. *Id.* at 30a. In the latter situation, "[t]here is no evidence on the record, no suggestion, and no reason to believe that anyone knew about" her sexual activity with petitioner, "and thus no reason to believe a preemptive false report on her part would be useful to her." *Id.* at 31a.

Judge Tucher dissented in relevant part. Pet. App. 40a-58a. He would have held "that the military judge abused his discretion when he prohibited the defense from cross-examining SR on her false statement to [petitioner] that the encounter [with the enlisted man] was nonconsensual," and that such error was non-harmless. *Id.* at 40a, 58a. He viewed the excluded inquiry to have been "highly probative of the defense theory that SR engaged in a pattern of fabrication to avoid discipline." *Id.* at 40a.

4. The CAAF granted discretionary review on the Confrontation Clause issue and affirmed by a divided vote. Pet. App. 1a-21a. The two-judge plurality stated at the outset that the CAAF "[t]ypically" reviews evidentiary decisions for abuse of discretion, and that it "ha[s] also applied the abuse of discretion standard to alleged violations of the Sixth Amendment Confrontation Clause." *Id.* at 5a (citing, *inter alia*, *United States* v.

Israel, 60 M.J. 485, 488 (C.A.A.F. 2005)). The plurality then concluded that the additional cross-examination of SR barred by the military judge "was not 'constitutionally required.'" *Id.* at 6a. It explained that by allowing petitioner "to present a fairly precise and plausible theory of bias"—namely, that SR "lied to preserve a secret which if revealed could have an adverse impact on her Coast Guard career"—the military judge had "provided [petitioner] what he was due under the Confrontation Clause: an opportunity to impeach the complainant's credibility." *Id.* at 7a (internal quotation marks omitted). The plurality determined that, with the "vital" issue of SR's prior lie already in evidence, "it is unclear why the lurid nuances of her sexual past would have added much to [petitioner's] extant theory of fabrication." *Ibid.*

Judge Baker concurred in the result. In his view, the case was "governed" by the CAAF's decision in *United States* v. *Banker*, 60 M.J. 216, 225 (2004), which placed on petitioner "[t]he burden * * * to prove why the M.R.E. 412 prohibition should be lifted." Pet. App. 8a. Judge Baker concluded that petitioner's "theory of admission [wa]s too far-fetched to pass constitutional * * * muster" because, among other things, "[i]t does not logically follow that someone who would lie to protect her privacy from a probing acquaintance would lie to the police and commit perjury." *Id.* at 9a.

Judge Erdmann, joined by Chief Judge Effron, dissented in relevant part. Pet. App. 10a-21a. Reviewing for abuse of discretion, *id.* at 13a, the dissenting judges concluded that "the evidence [was] clearly admissible," *id.* at 14a, and that the error was non-harmless, *id.* at 21a. In their view, the defense should have been permitted to argue that SR had previously lied about the consensual nature of her sexual activity with an enlisted man

in order to avoid discipline, thereby increasing the likelihood that she was lying about the consensual nature of her sexual activity with petitioner for similar reasons. See, *e.g.*, *ibid.*

ARGUMENT

Petitioner contends (Pet. 12-26) that the CAAF erred in reviewing for abuse of discretion his claim that the military judge's limitations on the cross-examination of SR violated the Confrontation Clause of the Sixth Amendment. That contention lacks merit. The CAAF's standard of review was correct and consistent with this Court's precedents, in particular *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). There is furthermore no conflict among the circuits that warrants further review of petitioner's case. This Court has recently denied certiorari on the question presented, *Larson* v. *United States*, 552 U.S. 1260 (2008), and should do so again here.

1. a. In *Van Arsdall*, this Court held that a trial court's restrictions on a defendant's cross-examination of a prosecution witness for bias amounted to a violation of the Confrontation Clause, but that the violation was subject to constitutional harmless-error analysis. 475 U.S. at 679-680. In reaching that conclusion, the Court observed that the Confrontation Clause does not "[p]revent[] a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Id.* at 679. Rather, the Court explained, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.* The Court found a violation of the Confrontation Clause in *Van Arsdall* itself

only because "the trial court [had] prohibited *all* inquiry into the possibility that [the prosecution witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." *Ibid.*

The military judge's restriction here on the cross-examination of SR is exactly the type of "limit[] on defense counsel's inquiry into the potential bias of a prosecution witness" that the Confrontation Clause gives a trial court "wide latitude" to impose. *Van Arsdall*, 475 U.S. at 679. The military judge did not "prohibit[] *all* inquiry into" a potential source of bias, *ibid.*, but instead "allowed [petitioner] to present a fairly precise and plausible theory of bias"—namely, that SR had previously lied to protect herself and was doing so again, Pet. App. 7a. The members heard SR "admit[] that she had been in a 'situation' that could have jeopardized her career and her ranking as a cadet; that the 'situation' was in violation of cadet regulations and possibly a violation of the UCMJ; and that she initially lied to [petitioner] about the 'situation.'" *Ibid.* Petitioner was limited only from cross-examining SR about the alleged sexual nature of that situation. That limitation was based on the very sorts of "concerns"—"harassment, prejudice, confusion of the issues, * * * [and] marginal[] relevan[ce]"—that the Confrontation Clause permits trial courts to take into account. *Van Arsdall*, 475 U.S. at 679; see Pet. App. 62a-64a (expressing concern that the members would take sexual-history evidence as proof that SR "is a bad person," that such evidence could create "prejudice to [SR]'s privacy interests," that such evidence could "sidetrack[] the member[s'] attention to a collateral issue," and that the "probative value of this evidence is * * * low").

In light of the military judge's "wide latitude" to cabin cross-examination in this way, *Van Arsdall*, 475 U.S. at

679, abuse of discretion was necessarily the appropriate standard of review. Petitioner objects that *Van Arsdall* merely "addresses the substance of the Confrontation Clause," and "reveals nothing about the proper appellate standard of review." Pet. 23. But the proper appellate standard of review naturally depends upon the issue the appellate court is considering. Under *Van Arsdall*, as applied to this case, the issue the appellate court is considering is whether the military judge's limitation on cross-examination was within the "wide latitude" he enjoys under the Confrontation Clause. 475 U.S. at 679. Such consideration is inherently deferential—the question is not what the appellate court itself would have done, but instead whether what the trial court did was "reasonable," *ibid.*—and is therefore properly described as "abuse-of-discretion," rather than "de novo," review. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 56 (2007) (observing that review of whether a sentence is "reasonable" equates to review of "whether the District Judge abused his discretion" in weighing the relevant factors); see also *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2766 (2010) ("Deference * * * is the hallmark of abuse-of-discretion review.") (quoting *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997)).

b. Petitioner suggests (Pet. 16-22) that deferential review of Confrontation Clause claims is anomalous and inappropriate. That suggestion is misplaced. The standard of review applied to a determination of constitutional dimension depends upon the nature of that determination. See *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985) ("[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question."). Not every constitutional right, or even every constitutional trial right, is reviewed de novo.

A defendant's constitutional right to be free of racial bias in jury selection, for example, is reviewed for clear error. See, *e.g.*, *Snyder* v. *Louisiana*, 552 U.S. 472, 478 (2008). That is because the critical issue is the prosecutor's discriminatory intent, and the trial court is uniquely situated to observe not only the prosecutor's demeanor in explaining his reasons for striking certain jurors but also the demeanor of the potential jurors themselves. *Id.* at 477.

Confrontation Clause claims similarly involve the sorts of judgment calls that the trial judge is in the best position to make. Cf. *Miller*, 474 U.S. at 113-114 (selection of standard of review "at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"). "In deference to a [trial] court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a [trial] court's evidentiary rulings." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008); see, *e.g.*, *Old Chief* v. *United States*, 519 U.S. 172, 180, 183 n.7 (1997); *United States* v. *Abel*, 469 U.S. 45, 54 (1984). In particular, and as petitioner acknowledges (Pet. 24-26), this Court has repeatedly held that "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court," *Alford* v. *United States*, 282 U.S. 687, 694 (1931), and has reviewed restrictions on cross-examination for abuse of that discretion. *Ibid.*; see *Glasser* v. *United States*, 315 U.S. 60, 83 (1942); *District of Columbia* v. *Clawans*, 300 U.S. 617, 632 (1937). As *Van Arsdall* demonstrates, a trial court retains "wide latitude" to exercise its discretion even under the Confrontation Clause, 475 U.S. at 679, and there is

accordingly no basis for allowing an appellant automatically to ratchet up the standard of review simply by invoking the Constitution. See *Davis* v. *Alaska*, 415 U.S. 308, 318 n.6 (1974) (noting that, in *Alford*, the Court had reviewed a cross-examination claim of "constitutional dimension" for abuse of discretion).

2. Petitioner asserts (Pet. 12-16) that certiorari is warranted because five federal circuits—the First, Fifth, Seventh, Eighth, and Tenth—would all have reviewed his claim de novo. That assertion lacks merit. No disagreement exists among the circuits that would justify granting the petition.

a. As a threshold matter, the difference between "de novo" and "abuse of discretion" review for a claim like petitioner's is largely, if not entirely, a matter of terminology. All five of the aforementioned circuits recognize *Van Arsdall*'s conclusion that the Confrontation Clause permits a trial judge to place "reasonable" limits on cross-examination. *United States* v. *Martínez-Vives*, 475 F.3d 48, 53 (1st Cir. 2007); *United States* v. *Hitt*, 473 F.3d 146, 155-156 (5th Cir. 2006), cert. denied, 549 U.S. 1360 (2007); *United States* v. *Linzy*, 604 F.3d 319, 323 (7th Cir. 2010), cert. denied, No. 10-5391, 2010 WL 2786838 (Oct. 4, 2010); *United States* v. *Oaks*, 606 F.3d 530, 539-540 (8th Cir. 2010); *United States* v. *Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010). As discussed above, de novo review for "reasonableness" is the functional equivalent of abuse-of-discretion review. See *supra* at 12; *Gall*, 552 U.S. at 56.

b. Even if there were a difference between de novo and abuse-of-discretion review in this context, four of the five circuits petitioner cites—the First, Fifth, Seventh, and Eighth—expressly hold that a trial court's limitation on the cross-examination of government witnesses does

not always receive de novo review. Instead, these circuits employ a hybrid approach that varies the standard of review depending upon the precise nature of the defendant's challenge: they review de novo arguments that limitations on cross-examination violated the Confrontation Clause by effectively preventing the defendant from challenging the witness, but review lesser limitations for abuse of discretion. See *Martínez-Vives*, 475 F.3d at 53 ("On a challenge to a district court's limitation of cross-examination, we first perform a *de novo* review to determine whether a defendant was afforded a reasonable opportunity to impeach adverse witnesses consistent with the Confrontation Clause. Provided that threshold is reached, we then review the particular limitations only for abuse of discretion.") (internal quotation marks and citations omitted); *Hitt*, 473 F.3d at 155-156 ("A district court's limitation of cross-examination of a witness is reviewed for abuse of discretion. Abuse-of-discretion review is only invoked if the limitation did not curtail the defendant's Sixth Amendment right to confront witnesses. Whether a defendant's Sixth Amendment rights were violated is reviewed de novo.") (citations omitted); *Linzy*, 604 F.3d at 323 ("When deciding whether limits on cross-examination are permissible, we must first distinguish between the core values of the Confrontation Clause and more peripheral concerns which remain within the trial court's ambit. * * * In determining whether the district court abused its discretion by limiting cross-examination, we must examine whether the jury had sufficient details about the witness to assess the witness' motives and biases. On the other hand, where the limit imposed on cross-examination implicates the core values of the Confrontation Clause, we review the limitation *de novo*.") (internal quotation marks, alter-

ations, and citations omitted); *United States* v. *Kenyon*, 481 F.3d 1054, 1063 (8th Cir. 2007) ("We review evidentiary rulings regarding the scope of a cross examination for abuse of discretion, but where the Confrontation Clause is implicated, we consider the matter *de novo*.") (citation omitted).

Though these circuits articulate their rules in different ways,[1] the rules appear to be functionally similar. The Ninth Circuit recently considered the law in all of these circuits, as well as this Court's precedents, in an en banc decision addressing the proper standard of review for Confrontation Clause cross-examination claims. See *United States* v. *Larson*, 495 F.3d 1094, 1101-1102 & n.6 (2007), cert. denied, 552 U.S. 1260 (2008). Relying on *Van Arsdall*, the Ninth Circuit concluded that de novo review applies "[i]f the defendant raises a Confrontation Clause challenge based on the exclusion of an area of inquiry," but that abuse-of-discretion review applies "[i]n reviewing a limitation on the scope of questioning within a given area." *Id.* at 1101. The Ninth Circuit went on to observe that this holding brought it "in line with a number of [its] sister circuits," including the First, Fifth, Seventh, and Eighth, *id.* at 1101 n.6, and this Court declined to review the issue, 552 U.S. at 1260.

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[1] There are some differences, for example, regarding the justification for applying abuse-of-discretion review to certain types of limitations on cross-examination—in particular, whether such deferential review is appropriate because those limitations implicate the Confrontation Clause only marginally, see *Linzy*, 604 F.3d at 323, or because those limitations do not implicate the Confrontation Clause at all, see, *e.g.*, *United States* v. *Davis*, 393 F.3d 540, 548 (5th Cir. 2004). What is important for present purposes, however, is not whether challenges to those limitations are appropriately labeled as "constitutional," but the standard of review that such challenges receive.

As previously explained (*supra* at 11), the military judge here did not exclude an entire "area of inquiry" (SR's lie about her previous misconduct), but instead merely "limit[ed] the scope of questioning within [that] area" (barring questions about the precise nature of that misconduct). *Larson*, 495 F.3d at 1101. Therefore, under the hybrid standard just described, petitioner's claim would be reviewed for abuse of discretion—the same standard of review that the CAAF applied.[2]

c. The Tenth Circuit, for its part, has two separate lines of cases that each set forth different rules. In some of its recent cases, the Tenth Circuit appears to have announced that de novo review applies to all Confrontation Clause cross-examination claims. See *United States* v. *Robinson*, 583 F.3d 1265, 1274 (2009); *United States* v.

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[2] The petition does not argue that the military judge's ruling *did* exclude an entire "area of inquiry," and such a fact-bound argument about how petitioner's particular claim ought to be characterized would not warrant this Court's review. Indeed, review on that basis would be especially unwarranted in light of precedent indicating that the CAAF itself would review de novo the preclusion of an entire area of examination. The CAAF has stated, in a case cited by the plurality here (Pet. App. 5a), that a "defendant's Sixth Amendment right to confront the witnesses against him is violated where it is found that a trial judge has limited cross-examination in a manner that precludes an entire line of relevant inquiry." *United States* v. *Israel*, 60 M.J. 485, 488 (2005) (citing *United States* v. *Atwell*, 766 F.2d 416, 419 (10th Cir. 1985) (explaining that abuse of discretion review is inappropriate "where the trial court precludes inquiry into an entire *area* of relevant cross-examination")); see *United States* v. *Carruthers*, 64 M.J. 340, 344 (C.A.A.F. 2007) (stating that a "military judge's discretionary authority arises only *after* there has been permitted as a matter of right sufficient cross-examination.") (emphasis added; internal quotation marks omitted). Even if the CAAF had misapplied its own precedent, that would be a matter for the CAAF, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Montelongo, 420 F.3d 1169, 1173 (2005).In other precedents, however, it has—like the First, Fifth, Seventh, Eighth, and Ninth Circuits—applied a hybrid abuse-of-discretion/de novo standard. See *United States* v. *Rosario Fuentez*, 231 F.3d 700, 704 (10th Cir. 2000) ("The complete denial of access to an area properly subject to cross-examination infringes on the Sixth Amendment right of confrontation, and constitutes reversible error. On the other hand, merely limiting the scope of cross-examination is a matter well within the trial judge's discretion and such an error will not lead to reversal unless an abuse of discretion, clearly prejudicial to the defendant, is shown.") (internal quotation marks and citations omitted); see also, *e.g.*, *United States* v. *Atwell*, 766 F.2d 416, 419-420 (10th Cir. 1985).

The Tenth Circuit's divergent precedents do not give rise to a circuit conflict that would warrant this Court's review. The Tenth Circuit has never explained or tried to reconcile the two lines of cases, and it is therefore unclear what standard it would apply to a claim like petitioner's. It is up to the Tenth Circuit, not this Court, to resolve this conflict, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), just as the Ninth Circuit recently resolved a similar intra-circuit conflict on the very same issue, see *Larson*, 495 F.3d at 1100-1102.

3. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle for considering it. In arguing that the standard of review was outcome-determinative here, petitioner (Pet. 15-16) and his amicus (NACDL Amicus

Br. 7-16)[3] ignore that petitioner's conviction was affirmed under *both* abuse-of-discretion *and* de novo standards of review. As previously discussed (see *supra* at 7-8), the majority of the United States Coast Guard Court of Criminal Appeals reviewed the military judge's ruling under a special military-specific statute that requires de novo appellate review of all issues. Pet. App. 25a & n.7; UCMJ Art. 66(c), 10 U.S.C. 866(c). It, like the CAAF, upheld the military judge's evidentiary ruling. Pet. App. 25a.

Accordingly, what petitioner asserts here is not merely the right to de novo review of his claim (which he already has had), but instead the right to de novo review by a second appellate court. That assertion implicates features that are peculiar to the military system, which interposes two appellate tribunals between the trial court and this Court, one of which conducts de novo review and one of which primarily exercises discretionary jurisdic-

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[3] Amicus National Association of Criminal Defense Lawyers additionally errs in suggesting (NACDL Amicus Br. 8-9, 11-12) that the military judge's evidentiary ruling in this case conflicts with rulings on similar facts in *Olden* v. *Kentucky*, 488 U.S. 227 (1988) (per curiam), and *White* v. *Coplan*, 399 F.3d 18 (1st Cir. 2005). In *Olden*, the trial court barred "*all* evidence" about the extramarital live-in relationship that the victim was allegedly lying to protect, going so far as to prevent the defense even from trying to show that she had lied about her living arrangements during direct examination. 488 U.S. 230 (emphasis added); see *id.* at 232 (recognizing trial court's broad discretion reasonably to limit cross-examination, but concluding that "the limitation here was beyond reason"). Similarly, in *White*, the trial court barred "*all* inquiry" into the victims' alleged prior false allegations of sexual assault. 399 F.3d at 22 (emphasis added). Here, by contrast, the members heard testimony from SR herself that she had previously lied in circumstances where she might have faced punishment for telling the truth; the only thing the members did not hear was the alleged sexual context of that lie. See, *e.g.*, Pet. App. 7a.

tion. See UCMJ Art. 67(a), 10 U.S.C. 867(a) (describing CAAF's jurisdiction). Petitioner therefore is incorrect in asserting (Pet. 16 n.14) that "[t]he military context in which this case arises does not affect its suitability as a vehicle to answer the question presented."

Finally, there are indications that the judges in the CAAF plurality and concurrence would have affirmed petitioner's conviction even under a de novo standard. See Pet. App. 6a ("We conclude that further cross-examination of [SR] was not 'constitutionally required.'") (plurality opinion); *id.* at 7a ("The military judge * * * provided [petitioner] what he was due under the Confrontation Clause: an opportunity to impeach the complainant's credibility.") (plurality opinion); *id.* at 9a ("The problem for [petitioner] is that his theory of admission is too far-fetched to pass constitutional * * * muster.") (opinion concurring in the result). No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

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No. 10-18

IN THE

Supreme Court of the United States

WEBSTER M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DANIEL S. VOLCHOK
Counsel of Record
SETH P. WAXMAN
A. STEPHEN HUT, JR.
EDWARD C. DUMONT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000
daniel.volchok@wilmerhale.com

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Respondent provides no persuasive reason to deny review. The relevant charges against petitioner Webster Smith depended entirely on the credibility of SR's assertion that her sexual encounter with him was nonconsensual. The military judge nonetheless restricted the defense's cross-examination of SR about her prior false claim that a consensual sexual encounter was nonconsensual. CAAF rejected Mr. Smith's Confrontation Clause challenge to the restriction, 3-2, after reviewing for abuse of discretion. Under this Court's precedent, however, constitutional claims like Mr. Smith's, which present a mixed question of law and fact, are properly reviewed de novo—for reasons respondent itself has

previously articulated before this Court. Respondent's discussion, moreover, confirms the circuit conflict regarding the proper standard of appellate review in cases like this. That conflict warrants resolution, because the confrontation right is fundamental and because the standard applied often determines the outcome. Finally, contrary to respondent's contention this case is a good vehicle to resolve the conflict. In particular, the strength of Mr. Smith's confrontation claim makes it entirely plausible that the outcome of his appeal would have been different had CAAF exercised plenary rather than deferential review.

I. This Court's Precedent Requires De Novo Review Of Constitutional Mixed Questions

Respondent first argues (Opp. 10-14) that CAAF's use of abuse-of-discretion review was proper. Given the circuit conflict and the issue's importance, certiorari would be warranted even if that assertion were correct. But it is not correct.

Respondent asserts (Opp. 11-12) that deferential appellate review is appropriate in cases like this because the Confrontation Clause gives trial courts "wide latitude" to impose "reasonable" restrictions on cross-examination. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). That simply does not follow. The fact that trial courts may impose a range of restrictions does not mean appellate courts must defer to a trial court's view that a particular restriction is within the permissible range. Discretion to select within a range is different from discretion to determine where the range's boundaries (i.e., the constitutional limits) lie. *Van Arsdall* granted trial courts the former, and thus appellate judges cannot hold a restriction that falls within the permissible range unconstitutional just because they

would not have imposed it. But *Van Arsdall* did not grant trial courts the latter. *See* 475 U.S. at 679-680, *cited in* Pet. 23. To hold otherwise would mean that trial courts can violate the Confrontation Clause so long as the violation is a "reasonable" one. *See* Pet. 22.[1]

Were respondent correct, moreover, that abuse-of-discretion review applies anytime the underlying substantive standard is phrased in "reasonableness" terms (Opp. 14), appellate courts would review Fourth Amendment rulings deferentially. But respondent argued the opposite—and this Court agreed—in *Ornelas* v. *United States*, 517 U.S. 690, 691, 695 n.4 (1995); *see* U.S. Br. 21, *Ornelas* (No. 95-5257), 1996 WL 32744 (espousing de novo review for the "ultimate constitutional question of objective reasonableness").

The Court has likewise mandated de novo review for numerous other mixed questions implicating constitutional rights. *See* Pet. 17-22; U.S. *Ornelas* Br. 20 (citing *Thompson* v. *Keohane*, 516 U.S. 99 (1995)). Ignoring that phalanx of consistent holdings (none of which turned on the underlying substantive standard), respondent cites *Snyder* v. *Louisiana*, 552 U.S. 472 (2008), in arguing (Opp. 12-13) that some constitutional

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[1] Respondent also misstates *Van Arsdall*'s holding. The Court did not hold that the Confrontation Clause is violated "only" if an entire line of cross-examination is prohibited. Opp. 11. It held that a violation occurs when "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility" but for the restriction. 475 U.S. at 680; *see also id.* at 685 (White, J., concurring in the judgment) (describing this as the Court's holding); *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) (per curiam) (applying this standard). Respondent's attempt (Opp. 19 n.3) to distinguish two cases cited by amicus NACDL—while ignoring the many others—is therefore unavailing.

questions are reviewed deferentially. *Snyder*, however, involved a question of fact, not a mixed question—hence the Court's review for "clear error." 552 U.S. at 474, 478; *see Ornelas*, 517 U.S. at 694 n.3 ("'Clear error' is a term ... [that] applies when reviewing questions of fact."). Mr. Smith does not contend that factual questions implicating constitutional rights are always reviewed de novo (just the opposite, *see* Pet. 18). He argues, rather, that this Court has consistently required de novo review of mixed questions implicating constitutional rights, and that it should do so again here. *See* U.S. *Ornelas* Br. 29 ("[C]onsiderations favoring de novo review carry special weight where a constitutional right is concerned.").

To be sure, the proper appellate-review standard is determined by the underlying issue. *See* Opp. 12. But that determination is driven not by the substantive standard applied to the issue but by: (1) the nature of the issue itself—whether it is legal, factual, or mixed, and whether it implicates constitutional rights—and (2) the extent to which independent review is necessary to control and clarify the pertinent legal principles. *See, e.g.*, *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 231-233 (1991); *Lilly* v. *Virginia*, 527 U.S. 116, 136 (1999) (plurality opinion); Pet. 17-18. Those factors, not the applicable substantive standard, determine which tribunal is better suited to address the issue, and hence whether appellate review is plenary or deferential.

Respondent also cites (Opp. 13-14) cases in which this Court reviewed cross-examination restrictions for abuse of discretion. As explained in the petition, however (at 24-26), nothing in those cases indicates that they involved constitutional challenges. Indeed, when the Court later characterized one case's holding as constitutional, it noted the anomaly of that case's deferen-

tial review. *See* Pet. 25. The cases respondent cites, moreover, long pre-date this Court's established jurisprudence regarding the selection of standards of appellate review. If any tension exists between that recent jurisprudence and the cases respondent cites, resolving it is simply another reason to grant review.

II. THE CIRCUIT CONFLICT WARRANTS RESOLUTION

As Mr. Smith explained (Pet. 12-14), a small majority of circuits always review confrontation claims like his for abuse of discretion, while a substantial minority always review de novo. Respondent does not dispute the former point, and the cases it cites (Opp. 15-16) only confirm the latter. *See, e.g.*, *United States* v. *Kenyon*, 481 F.3d 1054, 1063 (8th Cir. 2007) ("[W]here the Confrontation Clause is implicated, we consider the matter *de novo*."); *see also* Pet. 12. The circuit conflict is clear. In fact, respondent never asserts that it does not exist. Respondent argues only that there is no conflict "that warrants further review." Opp. 10; *accord* Opp. 14. That argument lacks merit.

This Court has rejected the notion that deferential and independent review are substantively indistinguishable. *See* Pet. 15. Yet respondent contends that resolution of the circuit conflict is unwarranted because in this context, de novo and deferential review *are* "functional equivalent[s]." Opp. 14; *accord* Opp. 16. That contention rests on respondent's view (Opp. 12, 14) that when the underlying substantive standard is phrased in reasonableness terms, de novo and deferential review are essentially the same. As explained above, that is manifestly incorrect. And NACDL's detailed comparative discussion (Br. 8-19)—which respondent ignores—demonstrates clearly that in this context, the appellate-review standard is critical. A

mature circuit conflict concerning the enforcement of a fundamental constitutional right invoked daily in our criminal-justice system surely warrants resolution by this Court. *See* Pet. 15, 20-21; NACDL Br. 3, 11-12.

Respondent next cites *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), in which the Ninth Circuit held that confrontation claims like Mr. Smith's are sometimes reviewed de novo and sometimes reviewed for abuse of discretion, depending on the severity of the challenged restriction, *see id.* at 1101.[2] As respondent notes (Opp. 16), *Larson* proclaimed that its approach aligned with the circuits that always review de novo in cases like this. *See* 495 F.3d at 1101 n.6. But that is incorrect. Indeed, after observing that Ninth Circuit panels had taken three approaches with claims like Mr. Smith's—de novo review, abuse-of-discretion review, and the hybrid approach—*Larson* explicitly adopted "the third approach," not the first. 495 F.3d at 1101.[3]

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[2] *Larson* recognized the circuit conflict, *see* Pet. 14, without ever suggesting that it viewed de novo and abuse-of-discretion review as "functionally equivalent," Opp. 14.

[3] If respondent means to endorse *Larson*'s approach, that endorsement is misplaced. *Larson*'s rule is easily manipulated. Simply by defining the relevant "area of inquiry" narrowly (or broadly), litigants or courts can declare that an entire area was (or was not) excluded. Furthermore, *Larson*'s premise, that exclusion of an area of inquiry poses a greater threat to confrontation principles, is infirm. Excluding an entire line of marginally relevant questions is significantly less objectionable than, for example, the limited but critical exclusion here. Finally, under *Larson* the applicable standard improperly depends on the severity of the cross-examination restriction. If that were correct, appellate courts would review de novo a trial court's ruling on a First Amendment challenge to a complete ban on certain expression, but review def-

Respondent nonetheless implies (Opp. 16-17) that, in light of *Larson*, Mr. Smith's confrontation claim would be reviewed deferentially in every circuit. Respondent's basis for that suggestion is its assertion (Opp. 18) that the minority circuits employ a "hybrid" approach like *Larson*'s. That is incorrect. Again, *Larson*'s hybrid approach involves applying two different standards to *Confrontation Clause* claims. Circuits in the minority, by contrast, always review confrontation claims de novo, while reviewing non-constitutional challenges to cross-examination restrictions deferentially. *See* Opp. 14-15; Pet. 12. That use of abuse-of-discretion review is irrelevant to the question presented, which concerns confrontation claims.[4] *Larson* simply cannot change the fact that several circuits would review Mr. Smith's claim de novo (respondent cites no case from any of those circuits reviewing such a constitutional claim deferentially). Indeed, *Larson* only deepens the circuit conflict. It provides no basis to deny review.[5]

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erentially when a less severe limitation—such as a time, manner, or place restriction—was at issue. That is wrong. The degree of restriction affects the substantive analysis, not the appellate-review standard.

[4] Likewise irrelevant is respondent's observation (Opp. 14) that all circuits (not surprisingly) apply the substantive confrontation standard adopted in *Van Arsdall*. As discussed, the substantive standard and appellate-review standard are distinct issues.

[5] The denial of certiorari in *Larson* itself (*see* Opp. 10, 16) does not suggest otherwise. There are many reasons to deny review in a particular case, and this Court often grants review on questions after multiple denials. *See, e.g.*, Br. in Opp. 2 n.1, *Oregon* v. *Ice*, 129 S. Ct. 711 (2009) (No. 07-901), 2008 WL 3200260 (listing eight earlier denials of the question presented). In *Larson*, for example, it may have genuinely appeared that the standard of review could not affect the outcome. *See* Br. in Opp. 18-20, *Larson* v. *United*

III. This Case Is A Good Vehicle

Respondent argues finally (Opp. 18-20) that this case is not a good vehicle to address the question presented. That is also wrong.

The fact that CAAF's review was discretionary (Opp. 19-20) is irrelevant. Courts exercising discretionary review are as obligated to apply the proper standard of review as other courts—certainly where, as here, the proper standard is itself a matter of constitutional significance. *See Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co.* v. *Sullivan* is a rule of federal constitutional law."); *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (labeling plenary review a "duty of constitutional adjudication"), *quoted in* U.S. *Ornelas* Br. 29. This Court has repeatedly deemed itself obligated to apply the proper standard when conducting discretionary review. *See Lilly*, 527 U.S. at 136 (plurality opinion) (stating categorically that "courts should independently review" certain Confrontation Clause claims, and applying that instruction itself); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) ("[T]his Court is under a duty to make an independent evaluation" regarding whether statements were constitutionally voluntary.); *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567-568 (1995) (similar).[6] Mr. Smith is not seeking a "right to de novo review by a second appellate court." Opp. 19. He

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States, 552 U.S. 1260 (2008) (No. 07-7481). As explained below, that is not true here.

[6] That these cases arose from state-court judgments confirms that the standard of review for federal constitutional claims is itself of constitutional dimension.

seeks to have CAAF's discretionary review conducted in accordance with constitutional requirements.

Respondent likewise errs in relying on the fact that the military system provides "two appellate tribunals," one that "conducts de novo review" and one that "primarily exercises discretionary jurisdiction." Opp. 19-20. There is nothing "peculiar" about that (Opp. 19); most state-court systems are structured the same way. And this Court regularly reviews judgments from state supreme courts that, like CAAF, exercised discretionary review. *See, e.g.*, *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010). The military setting does not affect the analysis here.

Respondent next questions (Opp. 20) whether CAAF's use of a deferential standard of review was outcome-determinative. Although Mr. Smith need not prove that the standard determined the outcome, *cf. Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001), there is powerful evidence that it did. Applying highly deferential review, *see* Pet. 15, CAAF affirmed by a single vote. Neither the plurality nor the concurrence, moreover, stated that the standard was irrelevant—a notable omission given that the parties hotly disputed what standard applied. The "indications" respondent points to that the standard did not determine the outcome, by contrast (Opp. 20), are far too equivocal. The plurality and the concurring judge should be taken at their word regarding the standard they applied. And if this Court clarifies that they should have reviewed the matter de novo, in a demonstrably close case there is every reason to believe that the result on remand would be different.

Respondent also notes (Opp. 18-19) that the Coast Guard Court of Criminal Appeals (CCA) affirmed after

reviewing de novo. The CCA's 2-1 affirmance does not demonstrate that all three CAAF judges who voted to affirm would do so upon plenary review. Indeed, Mr. Smith respectfully submits that review of the CCA majority's analysis, *see* Pet. App. 23a-28a—particularly compared with the dissent's, *see* Pet. App. 40a-58a—shows clearly the strength of Mr. Smith's Confrontation Clause claim and hence the likelihood that he would prevail before CAAF under de novo review.

As explained in more detail in NACDL's brief (and Mr. Smith's briefs below), the confrontation challenge here is compelling. The prosecution's case on the relevant charges rested *entirely* on SR's credibility. The defense sought to argue that her encounter with Mr. Smith was consensual, that she fabricated her contrary allegation to avoid being disciplined herself for violating cadet regulations, and that she had recently made a similar false claim about another man. That "commonsense" argument (Pet. App. 21a (dissenting opinion)) would have provided a powerful basis for the members to disbelieve SR—as, indeed, they disbelieved the other women who also accused Mr. Smith of misconduct but whom the defense was permitted to cross-examine fully. As to SR, however, the military judge's restriction on cross-examination eviscerated Mr. Smith's ability to present his defense. *See id.*; Pet. App. 56a-57a (dissenting opinion) (defense theory "of an almost spontaneous consensual encounter with SR would be difficult to believe unless the members were informed of SR's prior false claim and were able to understand the depths of her concern for protecting her career"); Pet. 9-10; NACDL Br. 10 (citing *Redmond* v. *Kingston*, 240 F.3d 590 (7th Cir. 2001) (Posner, J)). The military judge's rationales for the exclusion, moreover, were untenable. *See* NACDL Br. 10-16.

Respondent highlights (Opp. 11) the cross-examination that was allowed. But showing that SR had previously lied in unspecified ways about unspecified misconduct was a vastly less effective way of challenging her credibility than showing that she had recently lied about another consensual-but-proscribed sexual encounter being non-consensual. *See* Pet. App. 19a-20a & n.6 (dissenting opinion); Pet. App. 45a (dissenting opinion) (citing *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974)); NACDL Br. 8. Indeed, the nebulous questions and answers that were permitted may only have hurt the defense. *See Davis*, 415 U.S. at 318 ("[With] the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack[.]").[7]

Because SR's credibility—and hence the prosecution's entire case on these charges—would have been significantly diminished by the proposed cross-

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[7] Respondent repeats (Opp. 6, 8) the military judge's and CCA majority's arguments that SR's two assault allegations were significantly different. Those arguments fail. SR did not simply lie to Mr. Smith "*in confidence*." Pet. App. 64a. She knowingly allowed him to repeat her lie to others, thus making her false assault claim public. *See* Pet. App. 3a, 60a. Moreover, there is record evidence that others might have known about SR's encounter with Mr. Smith, giving her a clear motive to make a preemptive false report. *Contra* Opp. 8 (citing Pet. App. 31a). "The record reveals that" law-enforcement interviewed Mr. Smith, "the other person who knew of the [cadets'] encounter," before SR came forward. Pet. App. 52a (dissenting opinion). "Accordingly, the two statements were 'parallel' ... because of the illegality of the encounters and SR's fears that the true facts *could be* discovered." Pet. App. 53a. What weight to give this parallel should have been left to the members. *See* Pet. App. 53a-54a; *Davis*, 415 U.S. at 317.

examination, its exclusion was constitutional error. *See Van Arsdall*, 475 U.S. at 680, *quoted supra* n.1; *Olden*, 488 U.S. at 232 (per curiam); *Davis*, 415 U.S. at 317-318. While review would be warranted in any event to resolve the conflict among the courts of appeals, the strength of Mr. Smith's confrontation claim underscores that this case would be a particularly appropriate vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL S. VOLCHOK
Counsel of Record
SETH P. WAXMAN
A. STEPHEN HUT, JR.
EDWARD C. DUMONT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000
daniel.volchok@wilmerhale.com

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Jeffrey T. Green
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
1501 K Street, NW
Washington, DC 20005-1401
(202) 736-8291

Jonathan L. Marcus
Counsel of Record
Gregory M. Lipper
Jennifer Reid Whitfield
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000
jmarcus@cov.com

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct.[1] Founded in 1958, NACDL has a membership of more than 11,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases, including in cases in which the Court has recognized the importance of the rights protected by the Confrontation Clause. The Court's review of this case is critical to ensuring that trial courts do not unduly limit criminal defendants' rights to cross-examine key witnesses against them—rights that ensure the

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amicus*'s intention to file this brief.

integrity and preserve the truth-seeking function of the criminal trial.

Introduction

Petitioner Webster Smith's rights under the Confrontation Clause were violated by restrictions on his ability to cross-examine his accuser about her motive to fabricate sexual assault allegations against him. Had the court of appeals reviewed these restrictions de novo, as would have five other circuits, Cadet Smith's confrontation rights would have been vindicated; reviewing for abuse of discretion, however, the court of appeals upheld the limitations and affirmed his convictions by a vote of 3–2. Moreover, the conflict in the circuits over the correct standard of review is producing disparate results nationwide. The Court should resolve this conflict because it implicates an issue of fundamental importance, the scope of a defendant's constitutional right to confront his accusers.

First, Cadet Smith would have prevailed on appeal had review been de novo because the excluded cross-examination was central to establishing a pattern of false accusations by his accuser and her motive to implicate him. The dispute at trial was whether his sexual encounter with his accuser was coerced or consensual. Yet the trial judge prohibited Cadet Smith from cross-examining his accuser about a prior instance in which she had falsely alleged that a consensual encounter (with an enlisted man) was coerced. Courts in circuits that review de novo have overturned sexual assault convictions tainted by similar restrictions, and they have recognized that

information about prior false allegations of sexual assault is essential to a jury's assessment of an accuser's credibility. This Court's precedents confirm that the trial court erred in prohibiting Cadet Smith from eliciting this critical information.

Second, the standard of review affects not just this case, but others nationwide. Courts applying de novo review give meaningful scrutiny to limitations on cross-examination that implicate the Confrontation Clause and give full effect to defendants' constitutional right to thoroughly examine their accusers' credibility; courts reviewing for abuse of discretion far more readily uphold such restrictions. Thus, constitutional violations that are redressed in the circuits that review de novo would be left undisturbed in circuits that review only for abuse of discretion.

"The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth determining process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Considering the importance of a defendant's right to cross-examine his accusers, the divergent protection of this right across the circuits warrants this Court's attention. The petition should be granted.

Statement

Webster Smith, a cadet at the Coast Guard Academy, was convicted of sexually assaulting a female classmate ("SR"). He maintained that the encounter was consensual. SR had recently falsely accused an enlisted man of sexual assault. She later

admitted that this encounter was consensual (and thus a violation of Coast Guard Academy rules that could have resulted in her expulsion and criminal prosecution). The trial court prohibited Cadet Smith from cross-examining SR about her prior false accusation, which Cadet Smith sought to introduce as evidence of her motives to fabricate, and pattern of fabricating, allegations of sexual assault because she feared military discipline and possibly criminal prosecution.

The False Accusations. SR initially told Cadet Smith that her previous sexual encounter—which had generated rumors among enlisted personnel—was not consensual. Pet. App. 60a. With SR's approval, Cadet Smith "informed the enlisted personnel who were spreading the rumors that the conduct was not consensual." *Id.* But SR ultimately told Cadet Smith that "the incident with the enlisted man had been a consensual encounter and that the scope of the encounter had been greater than she had previously described." *Id.*

In this case, SR alleged that Cadet Smith sexually assaulted her in the Academy dormitory. She did not allege that Cadet Smith used physical force. Rather, she claimed that he coerced her into engaging in sexual activity by suggesting that he needed "motivation" to continue to counteract rumors about her previous consensual sexual encounter with an enlisted man. *Id.* at 3a.

The Trial. At trial, Cadet Smith sought to cross-examine SR about her prior false accusation. He sought to use this evidence to "establish [SR's] pat-

tern of lying about sexual events," *id.* at 4a, in order to "protect herself from discipline," *id.* at 27a. Under cadet regulations, "sexual conduct is prohibited on Coast Guard Academy installations even if it is between consenting cadets." *Id.* at 16a n.3. Cadets who violate this prohibition can be expelled. *Id.*

The government argued that this line of questioning was barred by Military Rule of Evidence 412(a), which precludes evidence of an alleged victim's prior sexual behavior unless the exclusion of such evidence would violate the accused's constitutional rights. *Id.* at 61a. The trial judge concluded that the Confrontation Clause did not entitle Cadet Smith to cross-examine SR about her prior false accusations of sexual assault. *Id.* at 61a–64a.

Instead, the trial judge permitted Cadet Smith to inform the jury only that his accuser had a "secret" that "if revealed could have an adverse impact on her Coast Guard career, including possibly disciplinary action under the UCMJ." *Id.* at 62a. The trial judge believed that Cadet Smith's Confrontation Clause right was protected by this "generic formulation." *Id.* As relevant here, the jury found Cadet Smith guilty on the three counts relating to his sexual encounter with SR.

The Appeals. On appeal, a divided Coast Guard Court of Criminal Appeals affirmed. *Id.* at 23a–33a. The dissent concluded that the trial court's restrictions on Cadet Smith's cross-examination violated the Confrontation Clause. According to the dissent, had Cadet Smith been permitted to show that his accuser had falsely accused another person of sexual

assault following a consensual encounter, "members could [have] infer[red] that she had followed a similar scheme in fabricating a false complaint of indecent assault against [Cadet Smith]." *Id.* at 42a–43a. The dissent noted that "the Government made first use of evidence of SR's secret in its case-in-chief to prove that she was extorted and coerced into sexual relations with [Cadet Smith]," *id.* at 41a, yet the trial judge's ruling precluded Cadet Smith from countering the government's theory "by showing the depths of SR's fear [of disclosure of the secret] and the lengths she allegedly had gone—and was prepared to go—to shield the facts of her misconduct," *id.* at 43a. Moreover, by requiring euphemistic references to a "bad situation" or "secret," *id.*, the trial judge "allowed the Government to create a substantially different impression of [SR's] truthfulness than what the defense had sought to show through the excluded evidence," *id.* at 41a.

The Court of Appeals for the Armed Forces also divided on the Confrontation Clause issue and affirmed by a vote of 3–2. *Id.* at 1a–21a. Both the plurality and concurring opinions upheld the trial judge's ruling after reviewing it for abuse of discretion. *Id.* at 5a, 8a–10a. The dissent countered that the trial judge's ruling "deprived Smith of his best opportunity to provide a motive for SR's allegations and to challenge her credibility." *Id.* at 19a. Instead, with "limited information about SR's secret, the [jury] members were left to speculate whether the secret was a minor disciplinary infraction or a more serious charge, but they had no idea that the proffered evidence directly implicated SR's motive" to "lie

about the consensual nature of her sexual activities to protect her career." *Id.* at 19a, 21a. The dissent would have reversed because the jury never heard Cadet Smith's "commonsense explanation for SR's claim that the sexual activity was nonconsensual." *Id.* at 21a.

Reasons for Granting the Petition

I. Under De Novo Review, the Court of Appeals Would Have Concluded that the Limitations on Cadet Smith's Cross-Examination of His Accuser Violated The Confrontation Clause.

The ultimate result in Cadet Smith's case hinges on the issue identified in the petition and on which the circuits diverge: whether challenges to limitations on cross-examination that implicate the Confrontation Clause are reviewed de novo or for abuse of discretion. The court of appeals reviewed the trial judge's limitations on cross-examination for abuse of discretion. A court reviewing de novo would have reached a different result.

A. Although the trial court's restrictions on Cadet Smith's cross-examination of his accuser hamstrung his defense, his opportunity to secure appellate relief was narrow. The precedent of the Court of Appeals for the Armed Forces required Cadet Smith to establish that the trial judge's ruling "was arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quotations omitted). Indeed, that court will uphold restrictions on cross-

examination if the trial judge merely "articulate[d] [his] balancing analysis on the record." *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009).

In applying that deferential standard, the court of appeals failed to meaningfully address Cadet Smith's argument that cross-examination of his accuser about her prior false allegations of sexual assault would have established her specific motive to fabricate the sexual assault allegations against him. Specifics about SR's "secret" were critical to bolstering Cadet Smith's defense that SR would go to great lengths to protect her career and avoid possible criminal prosecution. The jury might have had little reason to believe that SR would have falsely accused someone of sexual assault to avoid potential military discipline or prosecution unless Cadet Smith could establish that she had done so once before.

In addition, upon learning that this was SR's second unlawful, consensual sexual encounter in the military environment, the jury would have better understood the intensity of her desire to lie. However weighty the risk of discipline that normally might accompany consensual sexual activity in a Coast Guard dormitory, discipline presumably would have been more certain and severe after a second unlawful encounter than after just one.

As a result, a court reviewing de novo almost certainly would have granted Cadet Smith relief. For instance, the First Circuit held under a de novo standard that a defendant's rights under the Confrontation Clause were violated by limitations on his ability to cross-examine his accusers about prior

false allegations of sexual assault. *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005) (Boudin, J.). In *White*, two girls accused the defendant of sexual assault; the trial court prohibited the defendant from examining them about their prior false allegations. *Id.* at 20. In reversing, the First Circuit found it significant that "[t]he past accusations were about sexual assaults, not lies on other subjects." *Id.* at 24. Because the past accusations involved the same conduct of which the defendant was accused, the court concluded that "[i]f the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive"—"very potent proof in [the defendant's] favor." *Id.*

Other courts have reached the same conclusion. The Massachusetts Supreme Judicial Court overturned a defendant's rape conviction after the trial judge precluded him from examining his accuser about a prior false rape allegation; the accuser's credibility might have been "seriously damaged" by "[e]vidence of prior false accusations of the specific crime which is the subject of the trial." *Commonwealth v. Bohannon*, 378 N.E.2d 987, 991 (Mass. 1978). Likewise, the D.C. Court of Appeals held that the Confrontation Clause required reversal of a defendant's sexual assault conviction because the trial court should have "allow[ed] cross-examination on the subject of [the accuser's] prior sexual allegation to support [the] defense's bias theory." *Obiazor v. United States*, 964 A.2d 147, 153 (D.C. 2009).[2]

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[2] Similarly, in considering a sexual-assault defendant's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), the Tenth Circuit

A meaningful cross-examination about SR's prior false allegation was especially important to allow Cadet Smith to provide context to the jury for a defense that might otherwise have seemed farfetched. In *Redmond v. Kingston*, the Seventh Circuit recognized the importance of providing such context. 240 F.3d 590 (7th Cir. 2001) (Posner, J.). There, applying de novo review, the court held that a trial court's refusal to permit cross-examination of the accuser about her prior false allegation of rape violated the Confrontation Clause. While the trial court had ruled that such examination "was cumulative of other evidence" that the accuser "had told lies in the past," the Seventh Circuit observed that "none of the other [admitted] evidence either involved a false charge of being sexually assaulted or furnished a motive for such a charge." *Id.* at 591 (quotations omitted). Cross-examination about the prior rape allegation could have established a motive, the court concluded, "for what would otherwise be an unusual fabrication [against the defendant]." *Id.* at 592.

3. The court of appeals also improperly deferred to the trial judge's suggestions that the prohibited line of cross-examination was embarrassing, distracting, unreliable, and unrelated. A more searching review would have revealed that the trial judge misapplied the law in invoking these concerns.

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concluded that the accuser's prior, false accusations of sexual assault created a "reasonable probability that, had the defense known of this evidence, the result of the proceeding would have been different." *United States v. Velarde*, 485 F.3d 553, 563 (10th Cir. 2007) (McConnell, J.).

1. The court of appeals improperly deferred to the trial court's concern about "unfair prejudice to [the accuser's] privacy interests." Pet. App. 64a. Because the defendant's right of confrontation trumps concerns about embarrassment to his accuser, a court reviewing de novo would have reached a different conclusion.

This Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), is instructive. In that case, one of the state's key witnesses against the defendant was on probation from a juvenile conviction. The defendant sought to cross-examine the witness about his "vulnerable status as a probationer" and about his "possible concern that he might be a suspect in the investigation." *Id.* at 318. The trial court, however, accepted the prosecution's argument that "exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures" and "cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgressions." *Id.* at 319. This Court held that these concerns—including that "embarrassment might result to [the witness] or his family by disclosure of his juvenile record"—were "outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial [prosecution] witness." *Id.*

In *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam), this Court reaffirmed the importance of cross-examination into an accuser's motivation—even if it might embarrass her—in a case involving allegations of sexual assault. In *Olden*, a white

woman accused a black man of rape. *See id.* at 228–32. The defendant maintained that the sex was consensual, and he sought to introduce evidence that his accuser lied to avoid jeopardizing her romantic relationship with another man (who the jury knew was black). *Id.* at 232. The trial court forbade the defendant from pursuing this cross-examination, concerned that "revealing [her] interracial relationship would prejudice the jury against her." *Id.* In reversing, the Court reiterated that concerns about embarrassment to the accuser, even as relates to sex, "cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [her] testimony." *Id.*

So too here. It was not enough for the trial court to invoke the "high value we as a society place on keeping our sexual behavior private." Pet. App. 61a. However substantial this concern under the rules of evidence, it "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Davis*, 415 U.S. at 320. The force of the Court's holdings in *Davis* and *Olden* is especially strong here, since Cadet Smith sought to cross-examine SR not on the details of the previous sexual encounter itself, "but rather the allegation that SR had previously lied about a sexual encounter under similar circumstances." Pet. App. 18a (Erdmann, J., dissenting).

2. The court of appeals further erred in deferring to the trial court's concern about "the potential danger of sidetracking [the jury's] attention." Pet.

App. 64a. In this classic case of he-said/she-said, the accuser's motive to lie was anything but collateral.

Even when concerns about distracting the jury are legitimate, "[r]estrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve." *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (quotations omitted). Especially in light of less restrictive alternatives such as limiting instructions, generalized concerns over "confusion of issues" must yield to the "strong potential [of cross-examination] to demonstrate the falsity of [the accuser's] testimony." *Olden*, 488 U.S. at 232.

Here, Cadet Smith's proposed line of questioning would not even have distracted the jury, because SR was the only witness against him as to the sexual assault charges. Cases such as *Hannon v. State*, 84 P.3d 320 (Wyo. 2004), instruct that when the lone witness's motive to lie is central to the case, limitations on cross-examination are especially suspect. In *Hannon*, the accuser implicated the defendant in a sexual assault only after the accuser himself was questioned by police about his role in sexually assaulting someone else. *Id.* at 332. The trial court prohibited the defendant from cross-examining the accuser about his motive to deflect attention away from his own sexual improprieties. In reversing the conviction, the Wyoming Supreme Court noted the centrality of the accuser's motive where—as here—the accuser is the lone witness against the defendant. *See id.* Whatever the residual risk of side-

tracking the jury, the court concluded, the defendant was entitled "to fully explore this before the jury." *Id.*[3]

Not only was SR's "secret" the core of Cadet Smith's defense, but there was little risk of an interminable sideshow. Cadet Smith sought only to question his accuser about the prior incident; he did not seek to introduce extrinsic evidence that might have bogged down the trial. Other courts have recognized that "[i]f the witness were prepared to admit on the stand that a prior accusation of similar nature was false," then "[n]o time-consuming excursion beyond the witness would be required." *White*, 399 F.3d at 25.

3. Third, the court of appeals improperly deferred to the trial court's reliance on its own assessment of Cadet Smith's credibility in precluding his proposed line of cross-examination. The trial court discounted the evidence of the prior false allegation as "not strong" because it "comes from the accused, who has an obvious bias." Pet. App. 63a.

But it was not for the trial judge to resolve whether Cadet Smith or his accuser was telling the truth. Courts applying de novo review recognize that it is improper to assume that a prosecution's witness—who, as here, herself may "have an obvious

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[3] *See also, e.g., United States v. Wilmore*, 381 F.3d 868, 870 (9th Cir. 2004) (defendant entitled to cross-examine witness about prior false allegations against him, notwithstanding trial judge's desire to avoid "a circus" that would result from the witness's repeated invocation of the Fifth Amendment).

bias"—is telling the truth. *See United States v. Jimenez*, 464 F.3d 555, 559–62 (5th Cir. 2006).

As this Court explained in *Davis*, a court "cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it." 418 U.S. at 317. To the contrary, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the accuser's] testimony." *Id.*

4. Finally, the trial judge improperly concluded that "even if [SR] falsely told [Cadet Smith] in confidence that her sexual encounter with the enlisted man was nonconsensual in an effort to suppress rumors, this would have little value in proving that her official allegations against Cadet Smith resulting in a public trial are also false." Pet. App. 64a (emphasis omitted).

For one, SR's first set of false allegations were more than private. She not only shared the false allegations with Cadet Smith, but allowed him to tell others that the enlisted man had sexually assaulted her—in order to counter public rumors that she had engaged in unlawful consensual sexual activity. And SR would have known that her first set of false allegations, once they went public, could have reached law enforcement and resulted in the enlisted man's prosecution.

Even more importantly, both sets of allegations formed a single course of conduct. The prosecution

used SR's "secret" to make its case. As the dissent in the Coast Guard Court of Criminal Appeals correctly explained, "the prosecution was able to present evidence that SR was coerced into unwanted sexual relations with [Cadet Smith] by the implied threat that he would reveal the facts of her 'bad situation.'" *Id.* at 43a. But the defense was prohibited from highlighting that the nature of this "secret" reflected a pattern of SR's false allegations of sexual assault and supplied a motive for her to falsely accuse Cadet Smith. The unnamed "secret" suggested that SR was coerced without physical force; only the details of that secret would have exposed SR's pattern of false allegations of coerced sexual activity to avoid military discipline.

* * *

An unexplained "secret" about an undisclosed "bad situation" is one thing. A pattern of false allegations about sexual assault is quite another. Without the chance to cross-examine his accuser about the details of her prior false accusation, Cadet Smith's right to confrontation was irreparably impaired. Because a court reviewing de novo could not have held otherwise, this case presents an ideal vehicle to resolve the circuit conflict identified in the petition.

II. The Standard of Review is Likely to Be Dispositive In Cases Throughout the Country.

The effect of deferential review on Cadet Smith's case is not unique. The difference between review de

novo and for abuse of discretion is likely to affect the outcome in Confrontation Clause appeals nationwide: the deferential standard applied by some circuits leads them to reject meritorious Confrontation Clause claims that would likely be successful in circuits reviewing de novo.

Courts reviewing for abuse of discretion tend to uphold decisions providing only minimal latitude for defendants to cross-examine even key witnesses against them. For example, in *United States v. Rosa*, 11 F.3d 315 (2d Cir. 1993), the Second Circuit upheld restrictions on cross-examination of a federal agent about gaps in his written report. Reviewing for abuse of discretion, the court determined that the "challenged testimony was so strongly corroborated by others officers participating in the same surveillance who testified to the same observation, that it was highly unlikely that the jury would have drawn any adverse inference from the absence of mention of the event in the first agent's written report." *Id.* at 337.

Similarly, in *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005) the Court of Appeals for the Armed Forces upheld limitations on cross-examination about the witness's plea agreement, since the jury was already aware of the plea agreement and "limiting the cross-examination simply precluded additional questioning on the subject." *Id.* at 135. And in *United States v. Scheetz*, 293 F.3d 175 (4th Cir. 2002), the Fourth Circuit upheld the district court's preclusion of questioning witnesses about minimum and maximum sentences, because the judge had in-

structed the jury about how the sentencing process operates generally. *Id.* at 184.

Under de novo review, by contrast, courts afford defendants the necessary leeway to thoroughly explore the credibility of key prosecution witnesses. Thus, in *United States v. Vega Molina*, 407 F.3d 511 (1st Cir. 2005), the First Circuit reversed the defendant's conviction after the trial court prohibited him from cross-examining an alleged co-conspirator about details of her prior criminal acts, because such questioning "had the potential" to undermine her credibility. *Id.* at 523. And in *United States v. Wilmore*, 381 F.3d 868 (9th Cir. 2004), the Ninth Circuit overturned restrictions on cross-examination about inconsistencies in the witness's testimony even though it was "impossible to know what such cross-examination would have revealed, if anything at all." *Id.* at 873.

The disagreement between the majority and dissent in a recent Tenth Circuit case illuminates how Confrontation Clause appeals can turn on the standard of review. In *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009), the Tenth Circuit majority—reviewing de novo—held that the Confrontation Clause required that the defendant be permitted to cross-examine an informant about his mental health history. *Id.* at 1275. Conducting its own analysis, the majority concluded that the excluded cross-examination "into the [informant's] mental health history may have undermined [his] credibility as a witness." *Id.* The dissent, however, applied a different standard and reached a different result. Noting

that the district court had concluded that such evidence would have been more prejudicial than probative, the dissent stated, "I cannot say the district court abused its discretion." *Id.* at 1281 (Tymkovich, J., dissenting).

As these cases confirm, the conflict over the standard of review in Confrontation Clause cases is not academic. When appellate courts review for abuse of discretion, defendants such as Cadet Smith are unable to redress violations of their constitutional confrontation rights, even when relief would be available from courts reviewing de novo. Given that the different standards of review will often produce different outcomes—in cases about a constitutional protection fundamental to the fairness of criminal trials—the Court should grant the writ of certiorari and resolve the question presented.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey T. Green
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1501 K Street, NW
Washington, DC 20005-1401
(202) 736-8291

Jonathan L. Marcus
Counsel of Record
Gregory M. Lipper
Jennifer Reid Whitfield
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, D.C. 20004
(202) 662-6000
jmarcus@cov.com

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IN THE
SUPREME COURT OF THE UNITED STATES

WEBSTER M. SMITH,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR AMICUS CURIAE, UNITED STATES ARMY DEFENSE APPELLATE DIVISION IN SUPPORT OF PETITIONER

MARK TELLITOCCI
Colonel, United States Army
Chief, Defense Appellate Division

JESS ROBERTS
Captain, United States Army
Appellate Counsel
Defense Appellate Division

JONATHAN POTTER
Lieutenant Colonel,
United States Army
Senior Appellate
Counsel
Defense Appellate
Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-6717
jonathan.potter@
conus.army.mil
Counsel of Record

QUESTION PRESENTED

When a trial judge's restriction on the cross examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause, is the standard of review de novo, as five circuits have held, or abuse of discretion, as six other circuits (and the court of appeals here) have concluded?

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466 U.S. 485 (1984). 7

Constitution, Statutes, and Rules for Courts-Martial

U.S. CONST. amend. VI 2,3

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Fed. R. Evid. 412(b)(1)(C) 5

Manual for Courts-Martial,
Mil. R. Evid. 404 6

Manual for Courts-Martial,
Mil. R. Evid. 405 6

Manual for Courts-Martial,
Mil. R. Evid. 412 2,3,5,6,7

Manual for Courts-Martial,
Mil. R. Evid. 412(a) 3,4

Manual for Courts-Martial,
Mil. R. Evid. 412(b)(1)(C) 5

Manual for Courts-Martial,
Mil. R. Evid. 412(c)(1) 4

Manual for Courts-Martial,
Mil. R. Evid. 412(c)(2) 4

Manual for Courts-Martial,
Mil. R. Evid. 412(d) 4

Manual for Courts-Martial,
Mil. R. Evid. 413.....6

Other Sources

Kerry C. O'Dell,
Criminal Law Chapter: Evidence in Sexual Assault,
7 Geo. J. Gender & L., 819 (2006).....3

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BRIEF FOR AMICUS CURIAE, UNITED STATES ARMY DEFENSE APPELLATE DIVISION IN SUPPORT OF PETITIONER

The United States Army Defense Appellate Division respectfully submits this brief as *amicus curiae* in support of the petitioner.

INTEREST OF AMICUS CURIAE

The United States Army Defense Appellate Division represents individual Soldiers who have been convicted by court-martial and who have been adjudged either a punitive discharge or confinement for one year or more. Defense Appellate Division

lawyers, all of whom are Judge Advocates, represent these individuals at the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States.[1] The Defense Appellate Division is deeply interested in this case because the relevant standard of review is implicated in virtually every contested sexual assault case litigated by Army appellate lawyers, and is currently at issue in numerous cases before the Army Court of Criminal Appeals and the Court of Appeals for the Armed Forces. The Defense Appellate Division offers the unique perspective of lawyers in the appellate trenches, litigating cases on a daily basis that involve the very issue in this case—the appropriate standard of review for a trial judge's restriction of cross-examination.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The petition for certiorari should be granted because the Court of Appeals for the Armed Forces applied an abuse of discretion standard, rather than the correct de novo standard of review. The plain language of Military Rule of Evidence (MRE) 412 indicates that decisions to exclude such evidence have constitutional implications, specifically regarding the Sixth Amendment right to confront

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[1] No counsel for a party authored this brief in whole or in part, and no person or party, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of intent to file and have consented to the filing of this brief.

witnesses, thus making a de novo standard of review appropriate.

The Army Defense Appellate Division agrees with the petitioner's argument that evidentiary questions that implicate Sixth Amendment and other constitutional claims should be reviewed de novo. The Defense Appellate Division's experience has generally been with the specific rule of evidence at issue in petitioner's case—MRE 412. Thus, the Defense Appellate Division's brief will explain that rule's implementation in courts-martial and demonstrate that MRE 412 and similar statutes in the civilian realm are a different sort of animal from other evidentiary rules, presenting a need for the extra protection afforded by de novo review.

REASONS FOR GRANTING THE PETITION

Military of Rule of Evidence 412 mirrors Federal Rule of Evidence (FRE) 412, which is also followed by ten states. Kerry C. O'Dell, *Criminal Law Chapter: Evidence in Sexual Assault*, 7 Geo. J. Gender & L., 819, 831 (2006). All fifty states and the District of Columbia have statutes that exclude the purported victim's consensual sexual activity with third parties. *Id.* at 820. Military Rule of Evidence 412 and similar statutes are exclusionary rules; so-called "rape shield" laws that place the sexual behaviors of an alleged victim of a sexual offense beyond the limits of relevancy. *See* Mil. R. Evid. 412(a); Fed. R. Evid. 412(a).

According to the language of MRE 412, any evidence of the "sexual behavior" or "sexual predispositions" of an alleged victim are forbidden from being entered into evidence. Mil. R. Evid. 412(a). Military Rule of Evidence 412(d) defines "sexual behavior" as any behavior that is sexual in nature outside of the charged offense. Mil. R. Evid. 412(d). This same section defines "sexual predisposition" as the alleged victim's "mode of dress, speech, or lifestyle that does not directly refer to sexual activities but that may have a sexual connotation." *Id.* The classic example is that MRE 412 would prevent the admission of evidence that an alleged victim habitually dressed provocatively, as though to say he or she invited the assault.

The rule prescribes strict procedures when contemplating admitting such evidence; not to protect the accused, but to protect the purported victim from potentially humiliating evidentiary arguments in open court. *See* Mil. R. Evid. 412(c)(1). The rule requires notice of the evidence to be offered be given to parties and the court at least five days before pleas are entered. *Id.* This notice must state both the nature of the evidence and the precise purpose for which it is being offered. *Id.* A closed hearing is then conducted outside the view of both the fact-finding panel and the public during which the parties may call witnesses and be heard regarding the admission of the evidence. Mil. R. Evid. 412(c)(2). Thus, the rule prescribes a mini-trial solely for the purpose of determining the evidence's admissibility.

Military Rule of Evidence 412 contemplates that evidence of "sexual behaviors" or "predispositions" might survive this closed hearing process and be deemed admissible under three exceptions. It is the third, MRE 412(b)(1)(C), that is by far the most litigated in military trials and appeals. This exception applies for "evidence the exclusion of which would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). It is identical in form and function to FRE 412 and the prevailing rules in a number of other jurisdictions. *See, e.g.*, Fed. R. Evid. 412(b)(1)(C). In the Defense Appellate Division's experience, every case implicating MRE 412 since 2006 has revolved upon this "constitutional rights" exception.

The "constitutional rights" exception to MRE 412 clearly brings the question of an accused's constitutional entitlements to the forefront of any ruling in which MRE 412 is used to exclude evidence. The exception is an acknowledgement of the fact that a rule which limits an accused's ability to confront witnesses, present a defense, and have his or her matter heard in a public trial must be wielded with extreme caution. Special attention must be paid to the tension between the legitimate protection of victims and the potential for a broad manner of application that destroys the constitutional protections of an accused. A judicial authority, by negative implication of MRE 412(b)(1)(C), must weigh an accused's constitutional rights in every case in which evidence regarding such an alleged victim is sought.

"Rape shield" rules are exceptions to the general precepts of relevant evidence and so warrant the heightened protections offered by de novo review. *Cf.* Mil. R. Evid. 405 (codifying the typical approach to relevant character evidence). One of the side-effects of MRE 412 is to prevent otherwise relevant and admissible evidence that may be critical to the defense from being presented to the fact-finder. When combined with MRE 413, which allows comparable evidence about the accused to be presented to the fact-finder, MRE 412 creates the anomalous result whereby the government is statutorily permitted to present a much broader range of evidence than the defense in sexual assault trials. *See* Mil. R. Evid. 413. Military Rule of Evidence 413 allows the admission of "evidence of the accused's commission of one or more offenses of sexual assault," with very few subject matter or temporal limitations, effectively making any prior sexual offense charge relevant, admissible evidence. The effect of this rule is an exception to the MRE 404 ban on character evidence being used to prove propensity, found in both the Military and Federal Rules of Evidence. *See* Mil. R. Evid. 413, 404.

Under MRE 412 and 413, for example, the government can present evidence of any sexual assault charge from the accused's past as evidence on the merits, but the defense is not allowed to present evidence that the alleged victim frequently fabricates sexual assault accusations. *See generally* Mil. R. Evid. 412, 413. The constitutional implications of such a scenario are clear and warrant close judicial scrutiny to ensure that justice is served. Thus, a de novo standard of review ensures that the rights of an

accused are balanced with the rights of the purported victim.

The adoption of de novo review would not require an appellate judge to re-try every evidentiary ruling made by the trial court. *See Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485 (1984). It would simply grant the appellate courts the power and ability to come to a different conclusion regarding an evidentiary ruling than the trial court below without having to extend deference to the trial court. *Id.* To authorize the de novo standard for cases such as this would merely allow an independent inquiry into whether a trial judge's ruling was sufficient to protect an accused's constitutional interests in an area of the law where they are particularly threatened.

A de novo standard is the appropriate standard of review in cases such as this. After all, MRE 412 and other "rape shield" statutes implicate constitutional issues, but they do so in a closed hearing that is essentially a mini-trial. Considering the complexity of such proceedings and the grave nature of the issues at stake, de novo review is appropriate. Indeed, logic demands that de novo review is necessary.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

MARK TELLITOCCI
Colonel, United States Army
Chief, Defense Appellate Division

JESS B. ROBERTS
Captain, United States Army
Appellate Counsel
Defense Appellate Division

JONATHAN POTTER
Lieutenant Colonel,
United States Army
Senior Appellate Counsel
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-6717
jonathan.potter@conus.army.mil
Counsel of Record